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THE
ALL INDIA REPORTER
1938
JOURNAL SECTION

UNIVERSITIES IN THE MACHINE AGE.

Problem of the Unemployed Graduate.

HAS LORD NUFFIELD SOLVED IT?

A Lesson For India?

BY EDWARD THOMPSON.

Mr. Edward Thompson, *novelist and publicist, was Educational Missionary at Bankura College in Bengal from 1910-1922. His writings include: "A Farewell to India", "The Reconstruction of India" and "A History of India".*

LONDON.

In this world, crowded with terrible happenings, comes the news of Lord Nuffield's latest gift of another million pounds to the University of Oxford, a gift additional to close on two and a half million pounds—or three crores of rupees—given already for medical and surgical studies.

This new gift is to found a new college whose purpose is to draw together the University and modern industry—the old culture and the practical necessities on which our life is built.

Prayaschitta for the Machine Age.

Those of you who are theologians—and we are often told that every Indian is a theologian—may think that in Lord Nuffield's gifts to the University of Oxford there is a measure of prayaschitta (atonement).

The Great War precipitated the world's headlong entrance into the machine age. Of that machine age, the motorcar, which is now finding its way into your own remote villages, is the most universally present symbol. Because of Lord Nuffield's great car works, Oxford has become the most rapidly expanding industrial town in England.

How fitting is it then—you who believe in prayaschitta may say—that the man who has so changed the whole character of this ancient and once quiet city should make these vast gifts to it and to its University! He began with rich endowment of the hospitals of Oxford. The one good thing that came out of the Great War was an immense advance in surgical skill and knowledge.

In this machine age there seem to me to be only two good things. One is, that with the spread of motor traffic there is far less misery for draught animals, especially horses.

Less Human Pain.

The other is, that human pain is less. For example, in my boyhood a visit to the dentist was a horrible experience—now it is nothing. That, at any rate, this industrial age which is ruining natural beauty—which is making Oxford into a second Glasgow or Manchester, and which is spreading miles of slagheaps and industrial

buildings along your own lovely Damodar river and in the Chota Nagpur highlands and in many other places—has achieved in the way of good.

And a world-famous industrialist, Lord Nuffield, has not only endowed Oxford's hospitals to deal with the innumerable maimings done by modern traffic, but has given the University of Oxford those three crores of rupees for medical and surgical studies and new professorships in these studies.

"The Nuffield Age".

And now he proposes to do in our costly and complex twentieth century what Kings and Bishops used to do centuries ago. It is one of those deeds which focus for us the fact that the world in which mankind lived for so long—in which kings and statesmen and ecclesiastics decided the thinking of mankind—is at last dead indeed.

No wonder the Archbishop of Canterbury has called this age the Nuffield Age! And because Oxford, like Athens, Rome, Peking and Delhi, is one of those names which belong to all civilized mankind, even in the crash of empires such as we are watching in the Far East—even in the menace of new wars under which we are living in Europe—men have paused to be astonished at Lord Nuffield's latest gift.

How Oxford Began.

Let me remind you of Oxford's history. We begin somewhere about the year 1200 A. D.—a turning point in India's history also, for it was about then that King Prithviraj, and with him Ancient India, went down before invaders. About this time, bands of English students at Paris, finding Paris uncomfortable because the King of England was quarrelling with the King of France, went back to their native land and began to meet in groups for study at Oxford, a small city set in a network of streams and marshes.

By degrees, these students were given homes and centres for their study. Colleges—the word does not mean buildings, but groups of people met together for some common purpose—were founded by kings and great ecclesiastics, and were endowed with buildings and funds.

Gradually, in the passage of the centuries, these foundations became fewer and at longer intervals until in the reign of King James I, three hundred years ago, so far as new Colleges went, the University of Oxford seemed to finish its growth. In the three hundred years between King James and Lord Nuffield, only the women's colleges and one man's college have been founded.

Mediæval Education: A Luxury.

Now what was it that boys and men studied at these ancient schools and colleges? It was not the manufacture of motorcars or ocean liners, not the action of acids and chemical forces, not the distribution of wealth and the problems of poverty and population. It was the great classical writers of Ancient Greece and Ancient Rome, it was law and philosophy and above all it was theology, which was called the Queen of the Sciences.

What happened as a result? The overwhelming mass of mankind were occupied with the grinding eternal task of earning a livelihood, they had neither time nor opportunity for these studies.

So the schools and colleges, which in many cases had been founded expressly for poor students, fell into the hands of those who had time and opportunity for the luxury which education then was. In other words, they became the preserve of the rich and of those classes—the clergy and schoolmasters—who were necessary to their continuance.

Our great schools and our two great Universities became the channel of an intellectual life which was indeed noble—but it was not the intellectual life of the people. They were important, because England's governors came from them; but they were not in the deepest and truest sense national.

The majority of people in every country are poor; and until yesterday Oxford and Cambridge were not the universities of poor men.

Modern Education for All.

Up till 1870 Matthew Arnold could describe Oxford as "whispering from her towers the last enchantments of the Middle Ages," those Middle Ages which had abundant zest and leisure for the discussion of Aristotle and theology and logic.

But in 1870, universal compulsory primary education was introduced in England.

At first, the far-reaching nature of this change, which today has become a revolution, was not apparent. The poorer classes did not always look on compulsory education as a boon, but as something to evade. They wanted their children at

home, to do housework or to look after cattle ; and the children disliked the discipline of school.

Today everyone accepts universal primary education as a necessity. And gradually the character of our education at the top, also at our Universities, has changed. Local authorities, such as county councils, offer scholarships to Oxford and Cambridge for poor boys who could not otherwise afford a University education ; and since the War, the valuable State scholarships have been founded.

As a result the University of Oxford is no longer the close preserve of the ruling classes and of those who depend on the ruling classes. Quite half the students come from schools which are not in any way famous or influential, and nearly half the students are getting financial help in their studies, from one source or other.

New Studies Oust Old.

The character of the studies has changed also, though always against opposition and with difficulty. It was hard to get the study of English literature established—just as in India it is hard to get the proper study of your vernaculars established. We have firmly fixed a tradition that Greek and Latin are more important than English or history, as you have one that Sanskrit and Persian and Arabic are more important than Urdu and Hindi and Bengali and Tamil and Mahratti.

However, bit by bit we have pulled into the main stream of our University studies not only English and modern European languages, but economics and history and social problems.

Some of us are working hard to pull in Oriental studies also, so that the time may not be far distant when every educated Englishman will at least look intelligent when he hears mentioned not only such names as Achilles and Julius Cæser, but Kalidasa, Valmiki, Akbar, Asoka and Jalal-ud-Din.

Does Oxford Fit Men for Business ?

But, while beauty and imagination are essential, you have also, most of you, to earn a living and we cannot all of us be writers or politicians or lawyers or schoolmasters or University professors.

The main part of mankind's activities is concerned with producing material things, with industry and commerce. How far does University education equip the man for a life in the world of business ?

It has to be admitted, it does not equip him for it. Let me quote a leading businessman of this country. He says, — "Young men leaving school or university are often very vague as to what are the responsibilities of management in business, what the interests of the work, and what the qualities of character and personality it calls into play. That is not surprising, because industry is one camp and the schools and universities another, and there is still not enough contact between them despite the growth of technological departments and of degree courses in economics and commerce at the universities."

Our young men at Oxford have been finding it increasingly hard to get jobs after they have finished at the University, and our wealthier classes, knowing this, have been increasingly sending their sons straight into business and not to the University, regarding the time spent at the University as wasted for practical purposes.

Are Indian Universities "Practical"?

What, then, is Lord Nuffield's gift meant to achieve ? This : he wants to close this gap between our universities and our country's practical life. The Fellows and tutors of his new College will be men whose studies bear on modern life on its practical side, and the students will be young men who have finished their University course and will be trained to understand and use the actual working sinews of England's modern life.

The machine has hold of you and me, and, however much we dislike, it is going to have hold of us increasingly and until we die. This is the machine age—the Nuffield Age. Greek and Sanskrit and Persian—poetry and philosophy and theology—these studies are not going to do all that a modern University must do if it is not to be a charming side-ornament but a central part of modern life.

We have our wonderful old buildings in Oxford, but outside Oxford, England has her vast industrial cities and black areas of unemployment.

In India you have your unequalled Himalayas, your exquisite Central India of ravine and forests, your majestic spreading rivers. You have also your dark industrial areas, your increasingly insistent social and practical problems.

Are your Universities and your system of thought and education adequate to cope with them ?

NOTE. — *The foregoing is a summary of a recent talk relayed from London and broadcast* by ALL-INDIA RADIO.

[*Indian Information Series, 15.1.1938.*]

DELHI SESSION OF LEGISLATURES.

GOVERNMENT'S PROGRAMME OF BILLS.

Eighteen Carried Over From Simla.

Apart from new Bills to be introduced in the Delhi Session of the Legislatures, which also have to consider the Budget, there are eighteen Bills left over from the Simla Session.

Two important measures to be introduced will be the Income-tax (Amendment) Bill, which arises from the Experts' Report published last year, and the Motor Vehicles Bill. Both these Bills are likely to be introduced late in the Session and referred to a Select Committee with a view to being taken up in the next Simla Session.

Legislation regarding Trade Marks is pending, but this is unlikely to be introduced in the Delhi Session, though a Bill is being prepared.

In view of the limited time available it is not possible to indicate to what extent the eighteen Bills carried over from Simla will be completed, but a number of them will be taken up in the early part of the Session.

Bills To Be Taken Up.

The Bills likely to come up early in the Session are :—

Insurance Bill : passed by the Assembly and by the Council of State with amendments : amendments made by Council of State to be taken into consideration.

Manœuvres Field Firing and Artillery Practice Bill : motion for consideration adopted : clauses to be considered and Bill to be passed.

Indian Companies (Amendment) Bill: report of Select Committee presented : to be taken into consideration and passed.

Destructive Insects and Pests (Amendment) Bill : introduced: to be taken into consideration and passed.

Indian Tea Control Bill : introduced: to be taken into consideration and passed.

Repealing Bill : introduced : to be taken into consideration and passed.

Other Bills Left Over.

The remainder of the eighteen Bills are :—

Trades Disputes (Amendment) Bill, Import of Drugs Bill, Workmen's Compensation (Amendment) Bill : referred to Select Committee : Select Committee to meet and present report.

Indian Oaths (Amendment) Bill, Commercial Documents Evidence Bill, Indian Naturalization (Amendment) Bill, Indian Patents and Designs (Amendment) Bill, Indian Soft Coke Cess (Re-construction of Committee) Bill: circulated for opinion : to be referred to Select Committee.

Indian Railways (Amendment) Bill (New S. 42-B), Dangerous Drugs (Amendment) Bill, Criminal Law (Amendment) Bill : introduced : to be taken into consideration and passed.

Indian Railways (Amendment) Bill (Ticketless Travellers) : referred to Select Committee.

[*Indian Information Series, 15.1.1938.*]

THE EFFECT OF RAISING OF ATTACHMENT IN A SUIT UNDER O. 21, R. 63, CIVIL P. C.

By K. S. GUMBHIR, B.A. (HONS.), LL.B., P.C.S., GOLD MEDALIST,
Administrative Sub-Judge, Rawalpindi.

I propose to discuss the following proposition of law in this article not because of its academic value but because of its great practical importance as it exists frequently. Suppose *A* obtains a decree against *B* and in execution thereof attaches some property showing it as belonging to the judgment-debtor. *C*, a third person, puts in an objection petition under O. 21, R. 58, Civil P. C., that the property attached is his, and suppose further that his objections are rejected: Then as no appeal is competent from that order, he files the usual declaratory suit under O 21, R. 63, Civil P. C., for declaration to the effect that the property is his and is not therefore liable to attachment and sale in execution of the decree against *B*. Supposing further the attachment is raised on the date the suit is filed either because the decree-holder does not want to continue his execution application or his claim is fully satisfied out of Court or the execution application is dismissed in default. The automatic result of dismissing of the execution application is undoubtedly the raising of the attachment of the property attached in the suit. So we are to determine the effect, if any, of the raising of the attachment on the suit instituted by *C* under O. 21, R. 63, Civil P. C. Undoubtedly the suit under O. 21, R. 63, Civil P. C., has two purposes, first being the establishment of the title of the plaintiff to the property in suit and second being the release from the attachment. Clearly, so far as the second object is concerned, it is undoubtedly achieved by the raising of the attachment but so far as the first object is concerned still the clouds of doubts remain on the title of the plaintiff. The second object is achieved not because the plaintiff has succeeded in establishing his claim to the property in suit but because the decree-holder for some reason or the other did not continue his execution application or his decree was satisfied outside the Court. It may be contended with apparent soundness that the suit under O. 21, R. 63, Civil P. C., of the plaintiff must, as a result of the raising of the attachment, also abate on the ground that the cause of action arose to the plaintiff on account of the attachment of his property and as the property was released on account of the raising of the attachment, so clearly the cause of action vanished. In fact this view was taken by Wallace J. in A I R 1927 Mad 893[1] in which the learned Judge observed as follows :

> Both Courts have overlooked the important fact that when the attachment was raised, the cause of action for the claim petition or for any suit founded upon an order on that claim petition thereby fell to the ground.

With all respects to the learned Judge, I feel constrained to strike a dissenting note, for, a suit under O. 21, R. 63 is not a suit for the release of the attached property but also for the declaration of the title, i. e. the release of the attached property must be a means to an end and not the end by itself. The property may be released by so many other means, but what the plaintiff prays and should pray for is that the property may be released on the basis of his own title, for, if it be declared that the plaintiff is the owner of the attached property, other things being equal, the release from attachment must follow automatically. Thus the central idea in a suit under O. 21, R. 63, Civil P. C., is the declaration as to whether the property is of the plaintiff or not. The second ground for dissenting is that the attachment of the property of a third party gives rise to two causes of action, first being that the property is not his and secondly that it may be attached. So the attachment of the property of the stranger gives him two rights—a right to sue for the declaration of his title to the property in suit and a further prayer that the possession of the attached property may be restored to him. Certainly O. 21, R 57, lays down that when the execution petition is dismissed, the attached property is automatically released but the alleged title of the third party still remains in suspense. Legally speaking, O. 21, R. 57 does not and

1. Hanuiah v. Hanuiah, (1927) 13 A I R Mad 893=104 I C 424.

cannot control a suit under O. 21, R. 63, Civil P. C. So the proposition that by raising of attachment the plaintiff in a suit under O. 21, R. 63 has no cause of action cannot be sustained. Another ground which forces me to disagree with the Madras view is that if in a suit under O. 21, R. 63, Civil P. C. the judgment-debtor also denies the title of the plaintiff, all that the Madras view lays down is that on raising of attachment, objections fall to the ground, but in this case if this very principle were to be applied the cause of action may fall to the ground so far as it arose in favour of the plaintiff by the attachment, but the contest between the plaintiff and the judgment-debtor in a suit under O. 21, R. 63, Civil P. C. will still have to be determined. So the theory that by the mere raising of the attachment the suit under O. 21, R. 63, Civil P. C., is not maintainable is clearly not wholesome. Therefore my considered opinion is that where a person whose property has been attached in execution of a decree against another person, and whose claim under O. 21, R. 58 has been rejected, brings a suit under O. 21, R. 63, Civil P. C., it is not a valid objection to that suit that it is not maintainable because the attachment has been raised subsequently for the following reasons:

O. 21, R. 63, Civil P. C. runs as follows:

> Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

It is conclusive in the sense that it cannot be agitated again in the execution proceedings in which it was passed unless a suit is brought within one year of the date of the order, i. e. that it is conclusive as between the claimant and the decree-holder who is proceeding against the property. So if a party whose objection has not been accepted does not file the suit as contemplated above, the order of rejection becomes conclusive so far as these parties are concerned, which really means that order disallowing the investigation shall not be subject to appeal but the claimant shall be left to prosecute his claim by a regular suit and this gives him a right of suit. Now this provision is imperative to my mind, for, the non-compliance of the above provision renders the order as conclusive. So there is an independent and unrestricted right of suit arising on the attachment of the property but not ending on the raising of the attachment. As forcibly put in the lower Court's judgment with which Cunningham and Tottenham JJ. concurred in 9 Cal 10[2]:

> Suppose the plaintiff has instituted this suit (under O. 21, R. 63, Civil P. C.) immediately after his petition was rejected, and before the execution proceedings were terminated, could it be contended in that case that he had no right of suit when the law expressly gave it to him? I think no such contention could be allowed. Then suppose that the execution proceedings were put an end to and the property released before the suit would have been decided, would the suit stop and fail because the attachment was removed? I believe the suit would not fail on that account. It seems therefore quite clear to me that a suit under S. 247 (O. 21, R. 63) would lie independent of the sale of the property attached. It is quite possible to imagine a case in which the execution proceedings might be delayed over a considerable period, and the suit disposed of in the meantime. If a suit instituted before the release of the property would lie, I see no reason why it should be disallowed by reason of the decree-holder not bringing the property to sale, and causing it to be released at its own choice. The section of the law gave the plaintiff a right of action in unlimited terms, and the restrictions imposed on it by the lower Court have not been supported by any provision of law I am aware of. I therefore cannot agree with the lower Court in thinking that plaintiff had no cause for this suit. That Court applied principles of declaratory decrees provided for by S. 15 of the Act, to this suit, but this case was not instituted under that section. Had it been so, it would have been of a quite different nature, and the principles laid down in the rulings quoted by the Court below, as well as in many others, should have been applied to it. But as it was a suit under S. 247 (O. 21, R. 63) these rulings could not be applicable: *see* pp. 11, 12 of 9 Cal.

Apart from the legal position explained above, another ground based on common sense is that if the interpretation from which I have disagreed were to be correct, then a clever decree-holder would attach the property of a person other than his judgment-debtor and on that person's objections being rejected (for under O. 21, R. 58, proceedings are of a summary nature and the question of title is not gone into, main governing factor being the possession) that person being forced to file a suit under O. 21, R. 63, his worry and expense can be set at nought by a simple filing of the execution petition and throwing grave doubts on the ownership of the property. Then say afterwards he files a second execution petition which really does not cost much, or comparatively it costs much less, and the same

2. Sreeputty Mirdha v. Kartic Singha, (1883) 9 Cal 10=11 C L R 181.

dispute may be re-agitated, then he may get his execution petition filed and then again create grave doubts on the title of the property of others. If there be no immediate legal injury or inconvenience to the third person's property, a path is certainly paved for future difficulties, for the public at large would come to know that the property is not of the person who alleges himself to be the owner or at least they will entertain grave doubts as to his title. If on any future occasion he wants to sell the property, the probability is 50 to 1 that desirable terms would not be secured. Again the Madras view lays down that the case abates as soon as the attachment is raised, i. e. the Court should not go into the case and thus it would not be able to burden any party with the costs of the plaintiff in the suit. If the same property is again attached and the suit is again brought, it shall again abate if the execution petition is dismissed, leaving the question of costs undetermined. So a third party, in this way, can be put to a great expense by a clever decree-holder without much risk, which is really very unfair.

For the above reasons I am of the considered opinion that the raising of the attachment subsequent to the filing of the suit under O. 21, R. 63, Civil P. C., has no effect whatsoever on the suit and the suit is legally maintainable and must be decided on merits.

Extracts from Contemporaries.

A False Description

A Metropolitan Magistrate had an interesting point to decide last week (*Times*, November 4) on the sale of Kosher meat. Three informations were laid against the defendant, a London butcher, one for selling meat which was "not of the nature demanded," and two under the Merchandise Marks Act for "applying a false trade description" to his meat. We do not read that the first summons was dealt with, but on the second two, the learned magistrate had to decide whether in fact the description given by the defendant to his meat was false. There is in London a Board which is the orthodox body invested with the duty of supervising and licencing the slaughter and selling of meat for Jewish consumption there. For some reason which it is impossible to guess, this Board refused to license the defendant, whereupon he went and got a licence from some other Rabbi who was not on the Board at all. The magistrate decided that this Rabbi had not the position and following among orthodox Jews to commend himself as a licensing authority to them, and that therefore any meat sold as Kosher meat on the strength of a licence given by him was sold with a false description. The cases under the Act are legion and we remember nothing quite near the point.—*The Law Journal.*

A Juror in Waiting

In the issues of *The Times* newspaper of the 11th Nov., there appeared a letter from one who, with some 200 others, had recently completed his term as a petty juror at the Central Criminal Court for the September session. His hours in the jury box totalled fourteen-and-a-half, but those hours were scattered like beads of a disrupted necklace; he had to attend on no fewer than ten days spread over four broken weeks. As a juror in waiting he was afforded ample time for "learning and relearning the topography of all four Courts," but he would have been well satisfied with a less thorough course of study. To most people, the writer of the letter suggests, jury service in the Criminal Courts is the reverse of a pleasant job, but it is a duty imposed by citizenship, and must be performed, even at the cost of inconvenience and sometimes of financial loss. He thinks, however, that loss and inconvenience should be reduced as much as possible; the authorities are surely able to foresee within reasonable limits which cases will be short and which long and they should find it not too difficult to arrange a time-table for jurors which would make things more bearable. He has little doubt that if jurors could insist on being paid their expenses they would have to endure fewer wasted days. Certainly, if all losses could be added to the expenses and no very rigid test as to remoteness were employed, many jurors in waiting would be able to present quite respectable bills at the end of their periods of jury service, and the consequent demand for economy might make their lot much more endurable.—*The Law Times.*

REVIEWS

University College of Law Journal, Edited by P. B. BHAVE. Published by M. HIDAYATULLAH, B.A. (Cantab), BAR.-AT-LAW, at the University College of Law, Nagpur. Pages 80. Price Re. 1 each. We acknowledge the receipt of Part No. 1 of Vol. No. 5 of the above journal.

Commentaries on the Provincial Insolvency Act (5 of 1920), *by* L. SUBRAHMANYA SASTRI, B.A., B.L., Vakil, Madura. Pages over 500. Price Rs. 9.

This book supplies the need for an up-to-date commentary on the Provincial Insolvency Act. The author appears to have taken great pains and bestowed much thought in the preparation of this work. Not only has he lucidly explained the principles deducible from the mass of case law, but also he has discussed controversial points and given his own views boldly. He has rightly pointed out the necessity for amending some of the sections in the Act. The appendices contain much useful information including the rules of the Bombay, Allahabad, Madras and Calcutta High Courts. The book is bound to be a very useful work of reference on Insolvency Law both to the Bench and the Bar. The printing and get up leave nothing to be desired and the price is moderate.

The Indian Companies Act, 1913 *by* N. N. SIRCAR, Barrister-at-law, and SUSIL C. SEN, Advocate. The book can be had from the Book Company Ltd., College Square, Calcutta. Pages over 900. Price Rs. 20.

The authors of this invaluable commentary on the Companies Act as amended were mainly responsible for the framing and safe passage of the Amending Act in the Assembly; and this fact is bound to enhance the popularity and utility of the book as an authoritative commentary on the Companies Act. The changes made by the Amending Act and their implications have been lucidly explained. The notes to the Sections are exhaustive and critical with reference to case law—both Indian and English. The Index is well arranged and exhaustive. The printing and get up are good.

The Indian Income-tax Act, *by* B. R. Jain. Published by the Income-tax Law Publishing House, Chandni Chowk, Delhi. Volumes I and II. Pages over 700. Price Rs. 10 of both Volumes.

This appears to be one of the latest commentaries on the Income-tax Act The author has thoroughly and exhaustively dealt with the subject with copious reference to English and Indian case law. The Indian case law has been brought up to October 1937. The rules of the Board of Inland Revenue are given in the appendix. The book will be of great use to lawyers and income-tax authorities. The price is moderate.

Reform in Hindu Law

Need for Codification

By
(K. B. GAJENDRAGADKAR, B.A. LL.B., PLEADER, *Satara City.*)

A glance at the proceedings of the Imperial Legislative Council will convince the reader that in every Session, for the last ten years an attempt is made to bring some sort of Bill to make changes in the provisions of the present Hindu law. The Hindu Law of Inheritance Amendment Act of 1929, Child Marriage Restraint Act of 1929, Hindu Gains of Learning Act of 1930 and the recently passed The Hindu Women's Right to Property Act of 1937 are some of the instances to show that the present state of Hindu law is far from being satisfactory, and there is distinctly visible a growing tendency on the part of the legislators to reform the Hindu law with a view to bring it in a line with modern ideas and ideals. An attempt is made in this article to examine in brief the nature of the Hindu law, the possible ways of its reform and the necessity of its codification. The rules of Hindu law as observed by the Privy Council in 26 I A 113[1] are an admixture of morality, religion and law, and it is not often easy to determine where religion ends and morality or law begins. Mr. J. D. Mayne has put forth the view that Hindu law was originally independent of religion and based upon immemorial custom, that the religious element subsequently grew up and entwined itself with legal conceptions (Mayne, Hindu Law and Usage, p. 4). All this is more or less speculative. But what is certain is that the distinction drawn by modern jurists between municipal or positive law and moral or ethical law is not observed in the early Hindu jurisprudence. The whole body of rules regulating the life of a Hindu in relation to civil conduct as well as to the performance of religious ceremonies is included under the general name of the Dharmashastra.

The sources of Hindu law, according to practical classification are: (1) the original texts, (2) the commentaries on them, (3) established custom and usage, (4) judicial decisions. The shrutis consist of hymns and deal with religious rites, true knowledge and liberation. Beyond an incidental allusion to a rule of law, they hardly throw light on any question of positive law. We must refer to Smritis or Dharmashastras for the ascertainment of positive law as such. The Vedic texts are supreme and immutable, but the texts of the Smritis are of varying force and authority according to their purport, context and to the conditions, times and localities to which they are intended to apply. The authors of the Smritis themselves as well as their commentators always strive to accommodate themselves to the spirit of the times. In this connexion it is the opinion of some scholars that the Hindu law as found in the Smritis was never meant to be applicable to *all the Hindus* living over the length and breadth of this ancient land. For instance, Manu wrote his Smriti only for the tribe called the Manavas. Goutama compiled his law for the benefit of Chhandogas or followers of the Sama Veda and Yajnavalkya for Vajasanyeyi priests following the white Yajurveda. By a sweeping generalization all kinds of communities which were never meant to be governed by the conflicting dicta of ancient sages are bound hand and foot by the restrictions intended for small groups in an archaic age. Neither the status nor the requirements of modern communities are taken into account. In modern practice however the Dharmashastras are of less importance than the commentaries and digests based upon them and these in turn yield place to the judicial decisions. Commentaries were written by great scholars, who on account of their learning and intelligence must have occupied commanding positions in Hindu society. Their views no doubt reflected the general practice and the prevailing opinion of their times, and at the same time helped

1. Sri Balusu Gurulinga Swami v. Sri Balusu Rama Lakshmanna, (1899) 21 All 460=22 Mad 398=26 I A 113=7 Sar 330=9 M L J 67 (P C).

to mould the law under colour of interpretation into harmony with the requirements of the society.

The commentaries are at the present day the real authorities on the subject. Their definitions and constructions are held to be binding on the Courts except where they have been superseded by usage or modified by more authoritative exposition of law in the shape of judicial decisions. Vignaneshwara's opinion, for instance, is practically of greater importance now than the text he comments upon. The interpretations of the commentators have thus served as an agency for the gradual development of the law. Usage in a general sense has been another principal source of Hindu law. Courts are expected not to impose upon people any rule of law simply because it finds a place in the Smriti of Manu or Yajnavalkya without ascertaining whether it is living law or dead letter. The question came up for decision in the leading case in 12 M I A 397[2] as to whether the Indian Courts should administer the Hindu law as found in the original Shastras or as interpreted by present-day Pandits, and it was held that the law actually in vogue should be administered, however defective it may be and however far it may have departed from the spirit or letter of the ancient law. The decisions of the Courts of law established under British Rule have played a large part not only in ascertaining and supplementing but even in many respects modifying the Hindu law. There is no denying the fact that there has been a marked arrest in the development of Hindu law after the institution of British Courts of justice. The law which was originally administered by private tribunals was highly elastic and had gradually grown by the assimilation of new usages and the modification of ancient text law under the guise of interpretations, but its spontaneous growth was suddenly arrested after the administration of the country passed into the hands of the British and a degree of rigidity was given to it which it never before possessed.

The position of the present Hindu law in short is this. The law as it obtained in past centuries was presumably sufficient to meet the requirements of those times. But with the increasing changes in the social, cultural and economic conditions, it has become more and more inadequate and difficult of application. The intimate contact between the civilization and traditions of India and the ideas and institutions of the West, and the awakening of the national consciousness have also had their effect on the mental attitude of the more intelligent classes.

The Courts have, during a century or more of British Rule, introduced fundamental changes in the law as laid down in the books regarded by the Courts themselves to be of paramount authority. They thereby displeased the orthodox section of the community, on the other hand the Courts, being bound to administer Hindu law as laid down in the Sanskrit works, have their hands tied down in several respects and cannot completely introduce modern tendencies into the teaching of ancient books. The attempt made by our Courts to apply the old rules to the greatly changed circumstances has resulted in an increase of precision in some directions but at the same time has entailed a corresponding loss of adaptability. As a matter of fact Hindu law is becoming set and crystallized under existing conditions, instead of remaining fluid and adaptable as it was in previous centuries. The only cure for this state of things lies, the present writer humbly thinks, *in the enactment of uniform, simple, codified law.*

This short account of Hindu law is enough to show that what is being administered to-day is in no sense a code of ready-made law. It is a composite body of rules and exceptions of principles and precedents which have developed with time, circumstances and necessity. And it has to be gathered not so much from the original texts as from the authoritative commentaries of later times and more and more at the present times from the mass of judicial decisions. It would not be quite inaccurate to describe the present Hindu law as a sort of common law which has been slowly built up in the course of the ages on a solid foundation of accepted rules and established usages interpreted by commentators and Judges and altered here and there by legislation.

No one but the fanatic will assert that it is for the good of Hindu Society to preserve corruptions and perpetuate defects

2. Collector of Madura v. Muttoo Ramalinga, (1867-69) 12 M I A 397=1 Beng L R 1=10 W R 17=2 Suther 135=2 Sar 361 (P C).

that may have crept into its legal and social institutions in the course of the ages. Those who stand aghast at the very idea of any change in the Hindu law not only ignore the entire course of its development through the centuries but also do very insufficient justice to its remarkable capacity for its assimilation.

The rise of new interests and new circumstances in the progress of society bring in their train new questions of law, the proper solution of which is not always furnished by the existing codes. Among the agencies which have been effective in greater or less degree in the moulding of laws and institutions to suit changing needs and conditions may be mentioned: (1) custom, (2) individual choice, (3) judicial interpretation and (4) the last and the most important, legislation. Custom or usage has been one of the main instruments of legal development in India. Usages have grown side by side with the body of law and have tended it steadily. The fullest effect is given to custom both by Courts and by legislation. "Clear proof of usage will outweigh the written text of law" : 12 M I A 397.[2] Individual choice is exercised mostly when dispositions of property are made by means of alienations, gifts and bequests. It is specially attracted by circumstances where the laws of intestate succession are harsh and at variance with the dictates of natural love and affection. The practice of testamentation is not yet sufficiently widespread in India, ignorance, prejudice and inertia being the main reasons, besides, the operation of the joint family system. Indeed, the idea of a will was itself wholly unknown to Hindu law and the original Sanskrit has no distinctive term to express it; besides, the practice of testamentary disposition is still exceptional in India. Though wills are resorted to in towns to some extent, they are not well-known in rural areas. Many persons have even a sort of sentimental objection to making wills. Will-making has scarcely attained the footing of a habit, much less that of a custom. Until the people of this country acquire the testamentary habit to the same extent as the people of England or America, no inference can legitimately be drawn with regard to man's intentions from his omission to make a will.

Some legal reformers have urged that the option should be given to an individual or to any class or community to elect simpler, fairer and more reasonable provisions on the subject of succession to property contained in the Succession Act in preference to the rules of Hindu law on that subject. Such an enabling provision is not, it may be explained, the startling innovation that it may appear at first sight. For, under the Hindu law as it now stands, a Hindu may carry with him his personal law as a whole wherever he goes.

The proposal amounts merely to allowing any Hindu to change that part of his personal law which relates to the course of succession to his estate without necessitating a change of creed. In this connexion the remarks of P. Appasamy in his book "Legal Aspects of Social Reform" deserve careful consideration indeed. He says "The Succession Act was in the first instance drawn up for the benefit of *all the inhabitants of this country*. It was entrusted, before the Mutiny, to a body of distinguished lawyers of whom Sir Samuel Romily was the chief, and would probably have been welcomed or accepted by the country in the then state of public opinion if it had at once been passed into law. After that great event, it was considered unwise to seek to apply it to all persons, and so an exemption clause was introduced by which the vast majority of people for whom it was intended are now released from its scope. It is on the whole such a fair and reasonable piece of legislation that it appears to me that an option should be given to individual castes or communities to say whether they would elect for it in preference to Hindu law" (p. 25). Further, he remarks "if a testament drawn by a Hindu is deemed to attract all the English rules that have been evolved in the course of ages as to wills, I do not see any reason why, when he dies intestate, he should not likewise declare that all the rules as to intestacy that obtain under the Succession Act (which itself is an improvement on the English law of inheritance) should be made applicable to his family so far as succession to his self-acquired property is concerned" (p. 203).

Apart from individual needs and preferences, it must be recognized that social necessities and opinions are always in advance of law and the principal agencies through which the law is in modern times brought into harmony with society are *judicial interpretation* and *legislation*.

Before the discussion of these two methods of reform, it is worth while to consider another method which has found favour with those who seek reform in Hindu law and that is to explore and investigate the old texts. They seek to explain the present defects in law by pointing out that they are departures from the wisdom of the ancients. They seek to show that if you only go back to the purity of old authorities you will be restoring the law to a purer form, not merely to a purer form but also one more in accord with the need of the present times. This method unfortunately proceeds upon the assumption that the ancient texts foresaw all the needs of the future and that they contained every possible provision for the requirements of future ages. This process requires very often a considerable exercise of imagination and is also open to criticism on that account. But a more serious objection to this process is that those who place reliance upon it have too great a faith in the reasonableness of the people. These people think that it has only to be shown to the people that their present practices and usages are not in accordance with the old smritis and that they would at once revert to the ancient usages and abandon the present. This method certainly betrays a want of knowledge of the popular mind and its working. The cake of custom has grown so thick that it is not possible to make through it merely by resorting to the process of interpretation of the old texts and by successful criticism and research. This process of reform is inconvenient and almost impractical as far as the Hindu law is concerned.

Judicial interpretations largely employ equitable principles in moulding law. But this method is dilatory and inordinately expensive, the cost of it falling almost exclusively on litigants. While considering this mode of reform in Hindu law, it must be remembered that even after a current of decisions has been established by decisions of the High Court for years, cases are not rare where the Privy Council makes certain observations which are supposed to overrule the long current of decisions, and a crop of litigation at once springs up. This can be well illustrated by some concrete instances. It had long been thought that for a father's antecedent debt, not incurred for an illegal or immoral purpose, the whole family property including the son's interest was liable to be sold even if the father was alive. Then came the case in 39 All 437[3] in which the Privy Council made certain observations which were supposed to have overruled the above mentioned long current of decisions. Curiously enough, the Privy Council again restored the authority of the old rulings in 26 Bom L R 500.[4] Another striking instance is that of the law of adoption by a widow in the Bombay Presidency. It had been long established that a widow could not adopt, if her husband died in a state of union and if he had not expressly authorized her to adopt. The Privy Council in 24 Bom L R 609[5] held that in the Maratha country a widow can adopt without the consent of her husband's kinsmen, whether the husband was joint or separate at his death, provided he had not expressly forbidden her to adopt. But in 50 Bom 468[6] it was held by their Lordships of the Bombay High Court that the remarks of the Privy Council in 24 Bom L R 609[5] were obiter dicta and consequently no change had taken place in the law of adoption by the widow in the joint family in the Bombay Presidency. Then came recently a decision of the Privy Council in 35 Bom L R 200[7] in which it was held that the widow of a coparcener in a joint family has power to make a valid adoption without the consent of the surviving coparceners. After this decision of the Privy Council, a series of decisions were given by the Bombay High Court. The careful reading of these decisions will convince the reader that the law of adoption by a widow in the joint family is still in the confused state. For instance, Shingne J. held in 37 Bom LR 193,[8] that the adoption by the widow of the son was invalid as the estate has already vested in

3. Sahuram Chandra v. Bhup Singh, (1917) 4 AIR P C 61=39 I C 280=44 I A 126=39 All 437 (PC).
4. Brij Narain v. Mangala Prasad, (1924) 11 AIR P C 50=77 I A 689=51 I A 129=46 All 95=26 Bom L R 500 (P C).
5. Yadav v. Namdev, (1922) 9 A I R PC 216=64 I C 536=48 I A 513=49 Cal 1=17 N L R 145=24 Bom L R 609 (P C).
6. Ishwar Dadu v. Gajabai, (1926) 13 AIR Bom 435=96 I C 712=50 Bom 468=28 Bom L R 782 (F B).
7. Bhimabai v. Gurunath Gouda, (1933) 20 A I R P C 1=141 I C 9=60 I A 25=57 Bom 157 = 35Bom L R 200 (P C).
8. Vishnu Bapu v. Lakshmi Sakharam, (1935) 22 A I R Bom 182=158 I C 1085=37 Bom L R 193.

the third person. This view was first disapproved by Broomfield J. in 37 Bom L R 786[9]; for at page 791 he says: " With respect I find myself unable to accept the learned Judge's (Shingne J.'s) view that the adoption was invalid ". Further in 39 Bom L R 382,[10] which is a Full Bench case of the Bombay High Court and which is considered as the authority on this branch of law up to this time at least, the Chief Justice remarks at page 413 in that case : "The decision, I think, cannot be supported in so far as it holds that the adoption itself is invalid." Again Rangnekar J. who heard this case along with the Chief Justice approves the very decision of Shingne J. and remarks at page 439 : "I respectfully agree with the judgment and in my opinion that was the correct view to take on the facts." In 38 Bom L R 100,[11] Barlee J. has held the adoption to be valid. This view is held to be incorrect both by the Chief Justice and Rangnekar J., for, in that very Full Bench case the Chief Justice remarks with reference to that decision of Barlee J.: " In my opinion the decision is wrong" page 413. Rangnekar J. also agrees and remarks: "I respectfully dissent from the view taken that the adoption was valid " (page 441).

This discussion will show that judicial decisions are not always a sure and definite mode of the reform of Hindu law. When there are such divergent and contradictory opinions regarding a particular case even amongst Judges of the High Court which is considered as the highest tribunal, there is no wonder that lawyers who are supposed to be conversant with the current case law as reported in authoritative periodicals are themselves at a loss to know exactly the legal position of the widow as far as adoption is concerned. It becomes therefore very difficult to give a definite and correct opinion upon a question whether in a particular case a widow in a joint family can adopt. Codification of the Hindu law certainly will reduce all such evils. In another way judicial decisions are also helpful, for when the sources of law are texts and are open to the charge of obscurity or ambiguity, the Judge is within his province in trying to interpret the texts and evolving some rule or decision which would probably be in accordance with the needs of the times. But this method also has sometimes led to strange results as varying interpretations are put on the same text by Courts though there may be no varying interpretations of the commentators thereon. Manu says the " the son given away (in adoption) shall never take the family (name) and the wealth of his natural father " (गोत्ररिक्थे जनयितुर्न हरेत् कृत्रिम: क्वचित्), Manu Ch. 9, Vol. 142.

In a case in 29 Mad 437,[12] it was decided, following this text that where in a joint family a person was the sole survivor and was subsequently given in adoption in another family, he did not lose by the subsequent adoption the property he had already taken in the family of his birth. But in 40 Bom 429[13] it was held on the construction of the same verse of Manu that, where property had become solely and exclusively vested in a person who was subsequently adopted into another family, he became divested of that property by his subsequent adoption.

It must however be readily acknowledged that such progress as Hindu law has made for nearly a century past has been due mostly to the decisions of the Court though of course by these decisions very large inroads have been made on old Hindu law and strange results have therefore followed. To take an example: the Mitakshara is regarded as of the highest authority throughout India except in Bengal where the Dayabhag prevails. In spite of this, the Courts have departed from its doctrines in allowing a coparcener to sell his share in the joint family property for value, without family necessity, in allowing females like the son's daughter or son's widow to succeed, in interpreting the word stridhan whereby property inherited by a female even from a female is excluded from the incidents of being stridhan : 25 All 468.[14]

Legislation is ultimately the last and certainly most effective of the modes of reform in Hindu law. In the infancy of the nation, this method is rarely called into action for the general reform of pri-

9. Shankar v. Ramrao, (1935) 22 A I R Bom 427 =159 IC 697 = 60 Bom 89=37 BomLR 786.
10. Balu Sakharam v. Lahoo Sambhaji, (1937) 24 A I R Bom 279=170 I C 393 = 39 Bom L R 382=I L R (1937) Bom 508 (F B).
11. Umabai Bhagwant v. Nani Mahadeo, (1936) 23 A I R Bom 135 = 162 I C 133 = 60 Bom 102 = 38 Bom L R 100.
12. Narasimha Apparao v. Rangayya Apparao, (1906) 29 Mad 437=16 M L J 178.
13. Dattatraya v. Govind, (1916) 3 AIR Bom 210 =34 IC 423=40 Bom 429=18 Bom L R 258.
14. Sheo Shankar Lal v. Debi Sahai, (1903) 25 All 468=30 I A 202=8 Sar 465 (P C).

vate law, but its use becomes frequent in advanced societies with growing experience of its efficacy in achieving the desired objective. Legislation has also the very important advantage of making the laws of the country easily available and familiar both to the administrators of justice and to the people at large.

The objection commonly urged in British India against all such legislation is that Government should not interfere with the personal laws and social institutions of the people, that any such interference would be a breach of the Crown's guarantee of religious neutrality and that the necessity for reforms must be left to be determined by the people themselves. There can be no doubt that legislatures can interfere effectively for the purpose of removing the defects and filling up the gaps in the existing laws. All the ancient rules of evidence which depended on ordeals of fire and water and the caste of the witness or of the accused have been thrown overboard and a set of sensible rules are introduced which have become part and parcel of intellectual inheritance of modern India.

The archaic criminal law of the Hindus with its crude punishments varied according to the class of the offender have been supplanted by a simple and orderly Penal Code which has been found to be so admirable and useful that it has been copied in all the Native States and in such distant places as Hongkong and Zanzibar. The law of Contract, the law of Torts and other principles of the English equity have been transferred wholesale to India in substitution for the corresponding portions of the original Hindu law. Wills were unknown to Hindu law; the power of making testaments though in conflict with the Hindu principles of inheritance and tends to loosen the ties of agnatic family, has been accepted by educated public opinion without cavil or demur. The English laws of negotiable instruments and of limited companies have given an impetus to commerce by opening new avenues for capital and enterprise, and introducing western instruments of exchange. The Probate and Administration Acts, though profoundly alien in spirit to the original Hindu law, have been silently introduced, and have modified the practices of large communities. The Limitation and Registration Acts have likewise influenced the people and made them vigilant and assertive. Even in the domain of private or family law, there have been signal instances of legislative activity which have been accepted with acquiescence. Some of the more important of these measures affecting the Hindu community are enumerated below as likely to give an idea of the scope and nature of these interferences by statute : (1) Freedom of religion, (2) Hindu widow's remarriage, (3) Special Amendment Act, (4) the Hindu law of Inheritance Amendment Act, (5) Child Marriage Restraint Act, (6) Hindu Gains of Learning Act, (7) Hindu Women's Right to Property Act.

The Legislature has thus actively interfered in the past to modify the law when such interference was considered necessary and just and it can undoubtedly interfere in the future also for the same purpose. The principle of religious neutrality was adopted at a time when British administrators had no means of ascertaining the views of the people and the true rules of Hindu law. But now it is the Hindu members of the Legislature who are introducing Bills dealing with the rules of Hindu law and they will have the support of a large number of Hindus themselves. This cry for maintaining the religious neutrality is based on the statement in the famous Queen's Proclamation. The exact words in the Proclamation are "in framing and administering laws, *due regard* be paid to ancient rites, usages and customs in India." It is nowhere stated therein that *absolute non-interference will be observed*. And this principle in the Proclamation was explained by the then Viceroy and Governor-General of India, Lord Lansdowne, in 1891, in the following unequivocal terms :

> Now the Act *far from absolutely precluding the Government of India* from dealing with matters affecting religion contemplates the possibility of such legislation becoming necessary although it safeguards it from irresponsible initiation. The words of S. 19 show as clearly as possible that subject to proper precautions legislation such as that which is now taking place was contemplated by Her Majesty's advisers who were responsible both for the Proclamation and for the Act which I have quoted.

Then again, what may be a matter of right policy on the part of a purely foreign administration need not necessarily set limits to the constitutional powers of a Legislature established on a national basis on which all interests likely to be affected by its acts are adequately represented. That legislation must not be undertaken in regard to the personal laws of the Hindus without the unanimous support of

the entire community is surely an extravagant claim. If accepted, it would be tantamount to prohibition of legislation in any shape, for, in regard to measures of legislation, the only correct and feasible test is furnished by the principle of aiming at the greatest good of the largest portion of the community without sacrificing the legitimate interests of any. Where therefore an important measure of reform is dictated by the true well-being of the people as a whole and is supported by the mass of enlightened public opinion, the fact that there is a certain amount of dissatisfaction amongst the more conservative elements should not prove an insuperable obstacle. Such feelings of dissatisfaction are nearly always evanescent; they usually give place to acquiescence and after some experience even to a cheerful acceptance of the new situation.

Another objection raised against the reform in Hindu law by legislation is that India is a vast country and consists of a large number of provinces with marked diversities in conditions, languages, laws and customs. There are several schools of Hindu law in India. It would therefore be practically impossible to enact a uniform and comprehensive code applicable to all Hindus in British India. Really speaking there is not much force in the above objection. The present writer humbly thinks that it is now time that India should be governed now by one system of Hindu law. In the old days the particular author, say Jimutavahana or Nilkanth of Mayukha was held as authority in the territories in which that author primarily lived. Besides, there were then absolutely no means to ascertain the views of the author in Bombay for people living in places away from Bombay. Even in the Bombay Presidency there is one law in the Konkan, another in Gujarat and a third one in Maharastra. Is it essential now? Such kind of distinctions must certainly be dispensed with. The advocates of the reform of Hindu law assert that just as the All India Banking Committee was appointed with Provincial Committees to assist it, so All India Hindu Reform Committee may be appointed and if necessary and desirable provincial committees may be formed to assist the main committee and provincial notions and customs should be taken into account in suggesting reforms in Hindu law. This committee should not rest content with suggesting small instalments of reform, which will be satisfactory to none or at best merely serve to whet the appetite for further instalments but, to make a full and careful survey of the entire field and to submit a comprehensive and practical scheme of reform which without entailing violent departures from past tradition and progress, will serve to meet the just and reasonable requirements of the immediate present.

There are some who advocate a wholesale codification of Hindu law, codification not merely of the rules of the Hindu law as they are at present, but codification in the sense of amendment and modification. They consider that the system of Hindu law is one entire structure and it ought not to be impiously touched here and there but that the whole structure should be thoroughly examined and every part of it tested, and comprehensive codified Hindu law should be produced. In the absence of codification, there is great waste of money of litigants, there is immense loss of time and there are years of anxiety and suspense before the litigant ultimately knows his position under the Hindu law. Codification will reduce all these evils.

While there are others who fear that this ambitious project of the codification of entire Hindu law will involve great difficulty. It will take an enormous length of time. It will also rouse considerable agitation and opposition. In their opinion an ambitious project of this sort is the surest way of blocking necessary legislation on those points where the need for change is most pressing. Piecemeal legislation has thus its own manifest advantages over wholesale codification. These people therefore assert that the surest and most practical way of dealing with the defects in our law is to make alterations, as the necessity becomes felt. It is far better, they say, to take up those points first as to which the existing law is found to work with special hardship or injustice or the decisions of the Courts are in hopeless conflict. The wants of society are so varied that it is impossible for the Legislature to provide beforehand for every case and for all possible emergencies.

While discussing the possibility of the codification of Hindu law, it is interesting to note the observations by the Civil Justice Committee in its report. The Committee says:

So far as Hindu law is concerned, the project of a Code cannot, we think, be rejected as impracticable from a purely legal point of view provided that the attempt is made by stages . . . We have some excellent texts books on Hindu law; some of them cover the whole or practically the whole field so far as text books can cover it. But a Code of Hindu law is the work of many men for many years; a programme has to be laid down; and in the end the desirability of the Code can only be judged by the results of the attempt. Hindu law is highly logical but is of a very high degree of complication and the old principles are meeting with new social conditions so as to produce problems which the old logic does not always solve. (Pages 534-35).

So far as reform of women's rights in Hindu law is concerned, a cooked food is already provided by two reports on this subject. One is the report of the Committee appointed in Baroda State and its report is entitled "The Hindu Women's Property Rights". The Committee appointed by the Government of H. H. the Maharaja of Mysore has produced scholarly, thorough and all pervading report on this subject under the title of "Women's Rights under the Hindu law." On the strength of these reports, both the States have made enactments in their own States. These States, it can confidently be said, have the privilege of setting an example to other parts of India in so important and far reaching a matter—one that is both necessary and inevitable—as the final emancipation of women from unjust traditional restrictions and civil disabilities.

The legislative body in British India has certainly only to consider the weighty reports and the changes made and pass Acts accordingly. When will this auspicious day really dawn?

A COMMON ERROR

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It not infrequently happens that the compromises in civil suits or execution cases include matters extraneous to the suits in which the compromises are made, as for example: *A* sues *B* for the recovery of Rs. 1000; eventually *B* offers *A* that he would pay Rs. 1000 by certain instalments. *A* agrees to accept the sum to be paid by the instalments proposed by *B* only if *B* also agrees to allow his specific immovable property to stand as security for the due performance of his offer, say a house or a shop the description of which is specifically given and which is for our hypothesis of the admitted value of Rs. 500. In case of default *B* also offers *A* the right to sell the security offered. *A* accepts these terms and a petition is presented to the Court praying that decree be passed according to the terms of the compromise. The decree is accordingly passed. It may be noted that the petition for the compromise is not registered in accordance with the Registration Act of 1908. Subsequently *B* transfers his rights to one *C* in the house or the shop which had stood security for the due performance of the above-mentioned compromise. The question for determination is whether *A* has got by law any right to sell the property in case default occurs in the payment of the instalments. Such compromises are made so often and the common error is committed so frequently that I would like that every man dealing with the litigation must thoroughly understand that a compromise comprising immovable property of the value of Rs. 100 and upwards other than that which is the subject matter of the suit or execution proceedings requires compulsory registration: *vide* S. 17 (2) (vi), Registration Act of 1908. The penalty for non-registration is given in S. 49 of the same Act which provides that no document required by S. 17 to be registered shall affect any immovable property comprised therein. Previous to the Amendment made in 1929 of S. 17 (2) (vi), Registration Act, the law on the point was in a confused state. S. 17 (2) (vi) till 1929 ran as follows :

"Nothing in Cls. (b) and (c) of sub-s. (1), S. 17, Registration Act, applies to any decree or order of a Court or any award." Thus it was held by the highest judicial authority of their Lordships of the Privy Council in 47 Cal 485,[1] that any decree passed by a Court of competent jurisdiction did not require compulsory registration even if it comprised immovable property other than that which was the subject matter of the suit or execution proceedings. But it must be noted that the amended S. 17 (2) (vi) has superseded this Privy Council decision

1. Hemanta Kumari Debi v. Midnapur Zamindari Co., (1919) 6 A I R P C 79=53 I C 534 =46 I A 240=47 Cal 485 (P C).

to this extent, that if the consent decree comprises immovable property other than that which was a subject matter of the suit or execution proceedings, then it is not exempted from registration and if not registered, shall not affect any immovable property comprised in the consent decree other than that which was the subject matter of the suit or the execution proceedings. This is the rock where many a man has stumbled and many a clever defendant has escaped liability.

It is immaterial whether the registration is made the same day or within the time allowed by the Registration Act, for, once a document is registered, the registered document operates from the date of execution. Suppose, for instance, a decree is obtained on the basis of a compromise comprising immovable property other than that which was the subject matter of the suit or the execution proceedings on 1st January 1934 and its registration is effected on 1st August 1934; the effect of registration shall commence from the day the decree was obtained, i. e. from 1st January 1934 and not from 1st August 1934 when it is actually registered, because according to S. 47, Registration Act of 1908, the registration has retrospective effect from the date of the execution. It is a blunder to suppose that because a decree in a Civil Court has been obtained on the basis of a compromise comprising immovable property other than that which is subject matter of the suit or proceeding, the property comprised in the compromise is affected. This is not the law on the point. Unless the said decree is registered, it cannot and would not affect any immovable property comprised in the compromise other than that which is the subject matter of the suit or proceedings. This much would serve a warning to the persons concerned in civil litigation.

Before concluding, I would like to draw a line of distinction which their Lordships of the Privy Council have brought in bold relief in 43 Mad 214.[2] A petition of compromise as a rule recites the terms agreed by the parties with a prayer to the Court that either a decree or order of the Court be passed in terms of the compromise or the suit should be allowed to be withdrawn or dismissed and it had been often urged and also held in a large volume of cases that a petition of compromise is a mere statement to the Court that certain terms have been agreed upon between the parties with a request to the Court to dismiss the suit or allow it to be withdrawn or to pass a decree or order in terms of a compromise, and that the compromise does not create, declare or assign or extinguish any interest in the immovable property comprised therein. The principal argument in support of this contention being that the oral agreement preceding the drafting of the petition being the foundation of the compromise and the oral agreement not being in writing and the petition of compromise being merely a recital of that oral agreement, it did not require compulsory registration. This contention had carried the day till the decision of their Lordships of the Privy Council in 47 Cal 484[1] and their Lordships' decision in 43 Mad 244[2] in which they held that a petition of compromise is not a mere statement to the Court and that oral evidence to prove the oral arrangements between the parties themselves antecedent to the drafting of the petition presented to the Court was inadmissible having regard to S. 91, Evidence Act. We cannot imagine any agreement between the parties unless an oral agreement precedes it, but if it is once reduced to writing then that writing is the sole evidence of its contents and is the sole foundation stone of the terms of the writing.

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2. Varada Pillai v. Jeevarathnammal, (1919) 6 A I R P C 44=53 I C 901=46 I A 285=43 Mad 244 (P C).

The Scheme of and the Legislation for Free and Compulsory Mass Education.

THE VIDYA MANDIR SCHEME

A WAY TO THE SPREAD OF FREE AND COMPULSORY MASS EDUCATION WITHIN A FIXED PERIOD.

1. Historical retrospect. — In ancient India the primary duty of rulers was to look after the social well-being of the people. Famous seats of learning like Takshashila and Naland are land-marks in the ancient history of India. They always remind us that ancient Hindus were great admirers of learning and helped with grants and endowments gigantic institutions which diffused learning to thousands for centuries past. It will now serve no useful purpose to give details of all these institutions. Education was however widely diffused at the time when the Britishers came to India. Two sets of parallel schools were found in existence in the land—the parishads, tols and pathashalas of the Hindus on one hand and maktabs and madrasas of the Muslims on the other. Parishads were institutions of the learned and elders; tols were mostly confined to primary school instruction of the Brahmins; and pathashalas were the real elementary schools imparting instruction to all and were very numerous throughout the country. Maktabs were schools which were attached to mosques and were primary schools of our Muslim brethren and madrasas were their secondary and collegiate schools for higher learning.

2. With the advent of Europeans in India, wars and strifes began for supremacy. These conflicts hardly gave any time for thought as regards the development of education. In fact all progress was retarded by these strifes. They were all busy in territorial acquisition and aggrandizement of power. When the English ultimately established their supremacy over the Portuguese, the Dutch and the French, and became virtually masters of this land, they still found these parishads, tols, pathashalas, maktabs and madrasas in existence, the reason being that in many cases individuals had made endowments for education and therefore notwithstanding wars and strifes, schools started on such foundation continued to flourish in some parts of the country: but the general state of education had greatly deteriorated. To further the cause of elementary and oriental education in India, sporadic attempts however continued to be made from time to time by persons who were in the service of the East India Company. When Christian missionaries came and formed societies, the Company and its servants were afraid that missionary propaganda would create consternation in the minds of the Indian public. They were afraid of religious susceptibilities of the people and would not give them active support. But in the long run missionaries succeeded and carried on their educational activities. In 1792, it was thought that education in India should not be left in the hands of voluntary organizations as some responsibility for the spread of education lay on the Government. It was however not before 1813 that in the Charter of the East India Company a clause was inserted which empowered the Governor-General of India to spend one lakh of rupees each year for the spread of education. In the Despatch of 1814 we find that greater emphasis was laid on the need of spending more money on higher oriental study than on elementary education. It is in that Despatch that we find a good testimony to the system of education then prevailing. It says—

> " We refer with particular satisfaction upon this occasion to that distinguished feature of internal policy which prevails in some parts of India, and by which the *instruction of the people is provided for by a certain charge upon the produce of*

the soil, and by other endowments in favour of the village teachers, who are thereby rendered public servants of the country."

3. From 1814 till 1825 money was spent mostly for higher studies, but the struggle went on till 1835 when the fateful Despatch of Lord Macaulay was written, and the following policy was laid down, in the words of Macaulay—

"We must at present do our best to form a class who may be interpreters between us and the millions whom we govern—a class of persons, Indian in blood and colour, but English in tastes, in opinions, in morals and in intellect."

4. It is now admitted on all hands that Macaulay made a great mistake in imagining that western education would assimilate Indians to Englishmen in everything but their complexion. Lord Curzon, nearly 70 years after Macaulay's declaration admitted that "Ever since the cold breath of Macaulay's rhetoric passed over the field of Indian languages and Indian text-books, the elementary education of the people in their own tongue has shrivelled and pined." In spite of Lord Macaulay's Despatch of 1835, however, attempts were made by those who did not hold the view which Lord Macaulay held to survey the state of education in India, particularly in Bengal and Madras. It is significant that at the time when Lord Macaulay wrote his Despatch, according to the estimate of Mr. Adam who was appointed Special Commissioner for the survey of education in Bengal, there existed in the province of Bengal alone 100,000 schools for the education of the people. Not only he made a survey, but he also made a number of recommendations, which included—

(1) that to improve the indigenous schools the teaching staff must be improved;
(2) that on result of examinations held periodically by Inspectors, the Gurus should be encouraged by rewards and grants;
(3) that each district should have a normal school for training of teachers;
(4) *that small jagirs of land should be assigned in each village for the support of these improved teachers*; and
(5) that a few districts should be selected first for trial of this system.

5. Mr. Adam urged that the scheme as outlined by him should form the basis of true national education. It was unfortunate that his proposals were not given effect to and were turned down. Policy was pursued throughout the nineteenth century that knowledge should descend from the higher strata of society to the lower. It will be worthwhile to quote Mr. Adam's views on this policy. He says—

"Instead of beginning with schools for the lower grades of native society, a system of Government institutions may be advocated that shall provide, in the first place, for the higher classes on the principle that the tendency of knowledge is to descend, not to ascend; and that, with this view, we should at present seek to establish a school at the head station of every zillah, afterwards pergunah schools, and last of all village schools, gradually acquiring in the process more numerous and better qualified instruments for the diffusion of education. The primary objection to this plan is that *it overlooks entire system of native educational institutions, Hindu and Mahomedan*, which existed long before our rule, and which continue to exist under our rule, independent of us and of our projects, forming and moulding the native character in successive generations. In the face of this palpable fact, the plan assumes that the country is to be indebted to us for schools, teachers, books—everything necessary to its moral and intellectual improvement, and that in the prosecution of our views we are to reject all the aids which the ancient institutions of the country and the actual attainments of the people afford towards their advancement. We have to deal in this country principally with Hindus and Mahomedans, the former, one of the earliest

civilized nations of the earth, the latter in some of the brightest periods of their history, distinguished promoters of science; and both, even in their present retrograde stages of civilization, still preserving a profound love and veneration for learning nourished by those very institutions of which I have spoken, and which it would be equally improvident on our part and offensive to them tc neglect."

He further adds: "To make the superstructure lofty and firm, the foundations should be broad and deep; and, thus building from the foundation, all classes of institutions and every grade of instruction may be combined with harmonious and salutary effect".

6. Unfortunately the committee under the presidency of Lord Macaulay turned down Mr. Adam's recommendations. From 1835 to 1854 various attempts were made to establish indigenous schools, but the cry for instruction in English even in village schools caused a failure of all such attempts. In the year 1854 a new Charter was granted to the East India Company, and the Education Despatch issued by the Court of Directors laid the foundation of the institution of Universities in the Presidency towns. Mutiny broke out in 1857 and progress made since 1854 was reviewed in 1859 after the Mutiny. *The policy of soliciting contributions from the people for maintenance of schools was prohibited. The grant-in-aid system was pronounced as unsuitable. It commended to the careful consideration of the Government the levying of a special rate on land to defray the expense of schools for the rural population.* This was the death knell of all institutions which had flourished on the support of the people and under the grant-in-aid and endowment system.

7. In the Madras Presidency also similar enquiry was made. Sir Thomas Munro in his Minute written in 1826 observes that "during the eighteenth century wars and other causes made population migrate from place to place and thus disorganized the ancient system of education in the country".

He also recommended to remedy the defects by endowments of schools throughout the country by Government.

8. A committee of Public Instruction was appointed. This committee insisted on the necessity of securing the sympathy and co-operation of the people. With this view *the selection of staff was left to the principal inhabitants of a town.* The policy advocated by Sir Thomas Munro was, however given up, the committee was dissolved and a University Board was established, which was of opinion, that "the light must touch the mountain tops before it could pierce to the level and depths".

9. In other provinces various attempts were made. So far as the Central Provinces are concerned, there were few schools in the Nerbudda and Saugor districts. The Central Provinces Report of the Indian Education Commission states that prior to 1861, there was a system of State education in Saugor and Nerbudda territories imperfectly adapted after the mode of the North-Western Provinces (now United Provinces) and inferior to the system existing therein. In the districts of the late Nagpur Provinces, there was no State education at all. In Sambalpur and its dependencies there existed only few schools for general education. Sir Richard Temple says—

> "The people were thoroughly uneducated. In no part of British India could there be found a population of less education. There was not one indigenous school to fifty villages."

From 1817 to 1856, Government did nothing except opening two schools. One of these two was closed down in 1841. This was the state of education in our province before the British rule actually established itself.

10. In 1836, 5.8 per cent of the population was found literate. In 1931, it was 8 per cent. In 100 years literacy has gone up by 2.2 per cent. In the last 30 years in our province it has advanced only by 1 per cent. This state of affairs cannot be allowed to continue any longer. *To bring about intellectual and national revolution, spread of education in cent per cent. of population is essential and must be brought about within a fixed period.* It is admitted on all hands that an uneducated populace is dangerous for any form of government and more so for a democratic government. Great educationists all over the world have advocated free and compulsory education for the masses. When the great European war was going on, the Right Hon'ble A. H. L. Fisher moved for an increased grant in the House of Commons for elementary education. He supported his demand with a historic speech regarding it as a national investment worthy of being made even in that great hour of crisis for the British Empire.

11. The Director of Public Instruction, Central Provinces and Berar, in his note on mass education, which he wrote in 1936, says—

"History of every progressive nation tells us that the key to advance, both political and social, lies in literacy of the masses. The progress of India is dependent largely upon the extent of mass education and this reform cannot be delayed very much longer, since on it depends the future destiny of this country."

One of his distinguished predecessors, Arthur Mayhew, in his book on 'Education of India' also says, "if we were to carry on education as is being done today, it would take about two centuries for India to reach the present stage of literacy of over 90 per cent of England and Wales." It is indeed true, we cannot afford to wait any longer, and therefore, some way must be found.

12. **Provincial position.**—Present position is as follows :—

(1) The population of the Central Provinces and Berar is—15,567,723.

(2) The number of villages in the province is—39,762.

(3) The number of villages having schools is— 4746.

(4) The number of villages from which boys attend these schools and which may be called feeder villages to these schools is—9762.

(5) The number of villages having no approach to any school or where no facility for education exists is—25,254.

13. Let us take an account of the finances of our province and see whether it is possible to depend upon that source to achieve our object. The budget estimates for the year 1936.37 show total expenditure on education—Charged, Rs. 2,77,479 and Voted, Rs. 50,03,521—Total Rs. 52,81,000. The amount of expenditure for 1936.37 on primary education is Rs. 36,96,217. The expenditure, therefore, per head comes to Rs. 10.8.0. The percentage of boys and girls receiving education to the population between the ages 6 and 11 is 1.91. The percentage of boys and girls which should receive education is 15 per cent of the total population.

14. At the present rate, total expenditure would be Rs. 2,44,24,627. It is wholly inconceivable to get from the provincial exchequer and other sources even half of the amount so calculated in the near or distant future. If finances of the Government of the province are unable to solve the problem, it is up to us to find another way out. It will be conceded that the co-operation of the people and the Government alone will make possible what is otherwise almost impossible. The only way to achieve the end, therefore, lies in the adoption of the Vidya Mandir Scheme.

15. The Congress Party at its meeting held on 30th July 1937 appointed a sub-committee with the Hon'ble Minister for Education as its Chairman. The committee met on 31st August 1937 and approved of the scheme, which is known as the Vidya Mandir Scheme. The Hon'ble Minister for Education, in order to elicit public opinion and invite further suggestions, published a broad outline of it hereto annexed as Appendix A. He also toured in the province and placed it before representative gatherings in districts and sub-divisions which he visited. Various suggestions received and objections raised have been considered. The scheme was considered and approved at a meeting of the Federation of recognised educational institutions held at Amraoti on 5th November 1937. It was also placed before the Conference consisting of members of the Education Standing Committee and officers of the Education Department on 14th November 1937 and was adopted after a full and lengthy discussion by 13 votes to 3. On 14th December 1937, the Congress Parliamentary Party in the Central Provinces and Berar Provincial Assembly also accepted it. The following scheme, therefore, is an outcome of all the criticisms and suggestions made during the course of meetings and conferences and is based on principles accepted as aforesaid.

16. **Vidya Mandir Scheme.** — The scheme contemplates that—

Every village or group of villages within a radius of a mile having no schools and where about 40 boys and girls of school-going age are available shall have a Vidya Mandir.

The name "Vidaya Mandir" is intended to do away with the prejudice attaching to the present-day schools and distinguish new schools from the existing ones till all of them are converted into Vidya Mandirs. The name does not indicate, as some think, a temple having an idol or an image set up in it for worship. The word "Mandir" literally and truly means a house such as Arogya Mandir, Jnan Mandir, Udyoga Mandir' Nyaya Mandir, etc. Vidya Mandir, therefore, means nothing more or nothing less than a house of learning. In all Vidya Mandirs, education shall be through the medium of the mother-tongue. We shall have, therefore Marathi Vidya Mandirs, Hindi Vidya Mandirs and Urdu Vidaya Mandirs, according to the needs and circumstances of the residents of each place where Vidya Mandirs are founded. The name is attractive in more ways than one. To the 99 per cent of the population in villages, it will be a source of inspiration, and it is hoped that it will appeal to their generous and charitable minds.

17. **Aims and objects.**—In the revised primary syllabus for this province, a faint attempt has been made for the first time to define the aims of primary education. The first and most prominent aim is stated to be "ensuring literacy of such a type that it will not lapse after the pupils have left the schools."

It is also further stated that "the primary education should lead to the formation of healthy and hygienic condition of body and mind and provide instruction in subjects which will give the pupil a living interest in his environments."

Vidya Mandirs will no doubt accomplish all this, and much more than this.

18. Vidya Mandir will be a people's school.

(i) It shall not be divorced from the environments in which it will be situate. Such a school should make children realize the problems of village life and train them to take part in it effectively when they have finished their school career.

(ii) Not only it should reflect on all the characteristics of the village life, but it should prepare the village boys and girls for life's struggle in relation not only to the

village or the town or the district or the province, but to the country as a whole. It must have a national outlook.

(iii) The welfare of the village community shall be one of the Vidya Mandir's principal aims, and there shall be close co-ordination between the school and the community life, so much so that the people of the village may begin to feel that the school is their institution and their own concern. It shall be an important social centre where teachers, parents, boys and girls shall meet and discuss and solve the problems with which they are faced—national, social as well as educational.

(iv) In fact, Vidya Mandir shall be a radiating source of light and learning in a village and it will serve as a model for all-round progress. Agriculture, hygiene, sanitation and all things, which make up for the happiness of life of an individual and nation as a whole, will be taught there.

19. Beginning.—It shall be established on a voluntary basis first and, if proved successful, it would become a statutory obligation on each village or a group of villages to have a Vidya Mandir. It is expected that proprietors of mahals or estates shall take the initiative in establishing Vidya Mandirs generally, but it is open to a generous minded tenant in the village or a ryot in a ryotwari tract to do the same. Anyone who is interested in rural welfare may also donate money sufficient to secure the establishment of a Vidya Mandir.

20. Finance.—The necessary condition of the establishment of a Vidya Mandir is—

(1) *Grant of land* sufficient in area to give the teacher a living wage according to the locality in which the school is situate. Living wage will ordinarily mean about Rs. 15 per mensem. The area of the land will differ from village to village and tract to tract. Calculations based on accounts of the Agriculture Department and of some malguzars who keep regular and accurate accounts are given in Appendix B. They roughly and generally indicate how much land in a cotton, wheat or rice tract will be sufficient to give a Vidya Mandir a net income of Rs. 200 per year. The grant of land will be the primary and the main source of income for the support of a Vidya Mandir.

(2) There are *other sources* from which income can be augmented—

(*a*) All the charities in a village on festive and other occasions should be diverted to Vidya Mandirs.

(*b*) Merchants, traders and others, who have with them money collected from village people as Dharmaday, should be called upon to devote a good share of their collections towards Vidya Mandirs.

(*c*) Another source of income and an important source will be panchayati kothis, which will bring certain income to Vidya Mandirs. Panchayati kothis may be called grain banks of villages. In these grain banks cultivators may deposit a part of their income in kind every year at the time of harvest. The yearly contribution which each cultivator makes to build up the stock may depend on the area cultivated by each or the number of ploughs he uses to cultivate his area. The stock is or will be administered by panchas who will be elected by the subscribers themselves. Any member is entitled to borrow grain from this kothi to a limit fixed for each by the panchas and the borrower would agree to pay back the stock with interest thereon at the time of the next harvest. The beginning is generally small, but its usefulness is generally realized as the stock increases without any undue strain on members. This would be a measure of great self-help. A short account as to how the village of Bagmara in the Drug district has since 1926 benefited by such a kothi is given in Appendix C and will

be interesting reading. 50 per cent of the profits of these grain banks should go to Vidya Mandirs.

(*d*) In every Vidya Mandir education in or through some central industry may be given. This will also augment the income of Vidya Mandirs to a certain extent.

(*e*) In the event of famine or scarcity calling for Government help, if the endowment funds are not able to support Vidya Mandirs, Government's assistance can always be relied on. It is needless to dilate upon this point.

It will thus be seen that, if the aforesaid resources are tackled, there is absolute certainty of Vidya Mandirs being placed on a suitable and sound financial basis.

21. Procedure and Rules.—As stated above, Vidya Mandirs, to begin with, have to be started on a voluntary basis. As soon as an offer is made, a responsible officer of the Agriculture Department will be deputed to examine the land and submit a report stating the quantity required to give an annual net income of about Rs. 200. The report shall state also the productive capacity, cost of cultivation and rental valuation of the land. It shall also state what initial capital outlay will be required in the first year. The report shall also deal with the selection of site of the Vidya Mandir and the extent of co-operation of the villagers for the purpose of erecting Vidya Mandirs. If everything is found satisfactory, the Agriculture Department shall take charge of the land. Looking from all points of view, it appears that the direct control and management of the Vidya Mandir land and its cultivation for the first few years should be in the hands of the Agriculture Department. Where there is a village panchayat, it shall be its duty to appoint a sub-committee of its own for the proper supervision and management of Vidya Mandirs. Rules shall be framed making provision for the following :—

(i) Number of elected members of the managing committee,
(ii) number of co-opted members,
(iii) *ex officio* members,
(iv) procedure of election on adult franchise basis,
(v) management and cultivation of land,
(vi) maintenance of accounts of receipts and expenditure and annual audit,
(vii) management of Vidya Mandirs,
(viii) office-bearers,
(ix) duties and obligations of the office-bearers and members of the committee,
(x) supervision, inspection and control.

22. Property.—Property both moveable and immovable, shall vest in the village panchayat or district council, or ultimately in the Provincial Government. Legislation on the lines of the Charitable Endowments Act, 1890, shall have to be introduced to give validity to the gifts made and insure proper administration and control.

Capital outlay.—(*a*) A limited number of Vidya Mandirs shall be started in every tahsil or taluq in the first year at Government expense, for which provision should be made in the budget for 1938-39. Detailed proposals of expenditure required for different kinds of land and crops, both irrigated and unirrigated, have been framed by the Agriculture Department and are given in Appendix D. There is some difference between the actual figures as given in Appendix B and in the average estimates given in Appendix D. Such variations are natural, owing to difference in cropping and soils cultivated.

(*b*) If more offers are received than can be financed by the Government, land mortgage banks and co-operative central banks should be authorized to advance money, which may be repaid by long-term instalments on the security of the land guaranteed by the Government.

(*c*) It is also possible that some charitable institutions or generous-minded donors may take upon themselves to meet the initial expenses. Such Vidya Mandirs should also be started and the pay of teachers for the first year should be paid by the Government or the district councils, if they are found able to do so.

Buildings.—Arrangements shall be made for the construction of a simple type of building for a Vidya Mandir according to the needs of the place where it is situate. A model plan is annexed as Appendix E. It should not ordinarily cost more than Rs. 200 or Rs. 250. All facilities shall be given for its construction. If forest is situate nearby, materials available may be given free. A big building is not necessary. Children shall be given instructions in verandahs of the building or in the open air under the shade of a tree if need be. It would be a matter of lasting glory if teachers and pupils can boast of constructing their own Vidya Mandir building. In this connection it would be interesting to know how in Ushagram in Bengal buildings much bigger perhaps and double-storeyed have been constructed by the teachers and students. The following account is taken from the *Ushagram* magazine :—

". . . . It was in 1923 that four small one-room cottages were built almost entirely by the resident boys. . . Clay was at first used as a building material largely from necessity, there being no money with which to buy bricks. . . . Therefore the age-old methods of the Bengal villagers were studied and copied as nearly as possible. As time went on, clay as a building material began to be woven into the very philosophy of life in Ushagram. We began to feel that the mud house should be improved rather than replaced, and that with some improvements in the way of ventilation, sanitation, conveniences, fire-proofing, and other protection, it made an ideal home for the type of climate with which the rural people of Bengal have to struggle. Every cottage built in Ushagram is an improvement on the one built previously. The most satisfactory cottages have been those which are two-storeyed, and probably the cottages built in the future will be of this type. Recently we have been having inquiries concerning cottage plans, and since we think these new cottages are the best in plan of any yet built, we shall try to describe the plans. One of the cottages is for a "family" of eight girls and a teacher. The teacher will live upstairs and will have two rooms—one 11' x 6' and one 11' x 8', and a porch 9' x 8'—all upstairs. Her bathroom (7' x 7') will be downstairs but opening off the verandah near her stairs so that she will not have to enter the part of the cottage occupied by the girls. Her apartment is separate from their rooms. The girls live downstairs and have the following rooms : living room (11' x 16'), bath with toilet (7' x 7'), dressing and clothes room (8' x 8'), kitchen (8' x 13'), store room (8' x 10'), back portico used for dining (9' x 8'), and covered verandah on south and east to be used for sleeping (33' x 8'). The main walls are 2' thick. The floors are to be raised 2' and cemented to keep out dampness. The roof is to be thatch and tile. Both bathrooms are equipped with septic tank connection. The kitchen is to have enclosed shelves and the newest type of stove. The second cottage plan is much the same except that the teacher's rooms are downstairs and the girls have rooms on both floors. The work is being done by outside village men assisted by the students working in the morning before school. The earth has to be dug, then soaked with water and "puddled". On the second day it is ready to be lifted and carried to the walls of the cottage. There the clay is moulded carefully in layers of 1' thickness. Each layer must dry for two days before the next is put on.

Window and door frames are inserted as the walls progress. These cottages have a plentiful number of large windows and doors. The earth which is being used for the walls of the cottages is being dug from a canal which will eventually enlarge the present bathing pond and make an island of the portion of high ground on which one of the cottages is located. The plan is to bridge this canal with a rustic bridge."

23. **Staff.**—An important, if not the most important, item in the scheme of Vidya Mandir is the staff. A Vidya Mandir is generally expected to be one-teacher institution inasmuch as only boys and girls of the village, where it is situate, shall join it. The number of boys and girls in each Vidya Mandir is not likely to be more than 50 at the most. Even if the number exceeds this limit and goes even to 80, double shift system may be adopted or the old monitor system can be resorted to. A teacher of a Vidya Mandir shall have to be of a different type. His minimum qualifications shall be the present vernacular middle school certificate. Higher the qualification the better. He shall require special intensive training, and provision shall have to be made for it. The course and the period of training may be settled by a sub-committee appointed for the purpose.

Pledge.—The teacher shall be required to sign a pledge which shall indicate what he is expected to be.

Conditions of service.—In the pledge, the following conditions of service shall be incorporated :

(i) Probation for five years, and if work is found satisfactory, confirmation will follow. After confirmation, the teacher shall have to serve for 20 years more.

(ii) There shall ordinarily be no transfer from one Vidya Mandir to another. It shall be a life-long work for 25 years and if at any time the teacher misconducts himself, or does anything which, in the opinion of the committee, disqualifies him to continue as a teacher in the Vidya Mandir, his services will be dispensed with after due notice. The period of such notice will be fixed by rules.

(iii) The remuneration of a teacher of a Vidya Mandir shall be paid out of the endowment funds and ordinarily shall not be less than Rs. 15 per mensem in value. If the endowment prospers, he may be given more. After confirmation, his life shall be insured for Rs. 500 or thereabout. The policy shall be endowment policy or any other policy as may be decided upon by the committee. The teacher shall give a declaration as to whom the amount of the policy shall be given in case of his death just as is done in the case of provident fund amount. The policy shall be assigned to the president or secretary of the committee or the trust of a Vidya Mandir, or to the district council or Government.

Duties and obligations.—Duties and obligations of a teacher shall be—

(i) to reside in the Vidya Mandir and educate children of a village according to the syllabus and curriculum prescribed ;

(ii) to be *ex officio* secretary of a Vidya Mandir trust or committee and to maintain its regular accounts ;

(iii) to be in such charge of the property of a Vidya Mandir as the committee or trust may like ;

(iv) to do such social service, village uplift work, education, as may be entrusted to him ;

(v) to look after the physical uplift and welfare of children of a village ;

(vi) to be a keeper of village library and museum ;

(vii) to give national outlook to all the activities of a village ; and

(viii) to perform such other duties as may be prescribed from time to time.

Subjects of study.—Subjects of study shall be related to the environments of children and shall have an industrial and agricultural bias. A suitable syllabus is in the course of preparation. Mahatma Gandhi's scheme and our provincial syllabus and reports of various committees, vocational and otherwise, will be carefully examined, and courses of studies for four or seven years, adapted according to the provincial needs and circumstances, will be prescribed.

24. Vidya Mandir and Government departments.—Vidya Mandirs are expected to be centres of all activities in villages to which the attention of all the departments of Government besides the Education Department shall have to be directed. As at present, there is no co-ordination between one department and another, and as a consequence the result of their activities is not even visible. It shall be the duty of the Agriculture Department to see that the best use is made of the land endowed to a Vidya Mandir and its productive capacity is so enhanced that a Vidya Mandir farm shall serve as a real demonstration farm to villagers and improve their cultivation and general well-being. No better service than this the Agriculture Department of the Government can render. Medical and Public Health Departments should also work for Vidya Mandirs and look to the improvement, sanitation, hygiene of villages and help in all possible ways the teachers in charge of Vidya Mandirs to do social service in villages. Teachers of Vidya Mandirs can be acquainted with the knowledge of first aid and elementary medicines to enable them to render immediate help to villagers. The Co-operative Department should start multi-purpose societies of the Codinar type in every village where a Vidya Mandir is established. Veterinary Department should make it a point to concentrate its attention on Vidya Mandir cattle and demonstrate the department's usefulness. Thus, if all departments of Government connected with village life and its improvement co-ordinate and work in co-operation, Vidya Mandirs shall be a source which in the near future will make village-life interesting and happy and relieve the people from their poverty and misery in which they are living to-day.

25. Conclusion.—In the words of Thomas Munro written in his Minute as far back as 1826 "Whatever expense the Government may incur on education of the people will be amply repaid by the improvement of the country ; for the general diffusion of knowledge is inseparably followed by more orderly habits, by increasing industry, by a taste for comforts of life, by exertion to acquire them and by the growing prosperity of the people." Government feels convinced that, if Government servants and the people both combine and co-operate and make a joint effort, success of the scheme will be amply demonstrated even at the end of the first year of its inauguration. Nothing can then prevent the free and compulsory education of all boys and girls within a fixed period. If proprietors of mahals and estates really desire their own prosperity and the prosperity of their children and children's children, they should generously come forward and make a voluntary offer of the required land before the law makes it obligatory for them to do so. Let owners or holders of maths, big and small, and of other religious or charitable institutions, temples, mosques and others, realize that time has come in the history of India when they should voluntarily come forward and make the offer and get the credit before it is too late. All

merchants, traders and sahukars, who have accumulated with them large sums of Dharmaday, should give voluntarily to the Vidya Mandirs at least 10 per cent. of it and create a Vidya Mandir Fund for facilitating their establishment. Let all others, including Government pensioners who can and who have the will to help in any way, come forward and make this venture a success.

Success of Vidya Mandirs is sure to relieve unemployment of the educated and give them undreamt of and unique opportunity of rendering service to the motherland. Let individuals as well as associations, political and social, all come forward to help this noble cause. *Vande Mataram.*

(WITH THE KIND PERMISSION OF THE HON'BLE THE MINISTER FOR EDUCATION, *CENTRAL PROVINCES AND BERAR.*)

EXTRACTS FROM CONTEMPORARIES

The Stop Light.

The decision of the Court of Appeal in *Croston* v. *Vaughan* (*Times*, October 26, 27, 28) is of great importance to the motoring community, and therefore, we may say, to the world at large. Perhaps the case should be called *Buckley* v. *Vaughan*, for, as it came to the Court of Appeal, it resolved itself into a duel between two parties who bore these names. Against both of them jointly, the original plaintiff had recovered heavy damages, the first, because she was driving a car next but one in front of the plaintiff, and did not (as both Courts held) give any warning of her intention to stop; the second, because his servant, the driver of a taxi-cab in which the plaintiff was being carried, was negligent. Let us interject that the law as to hackney carriages is such that their owners, whether within or without the Metropolitan Police district, are liable to passengers for their drivers' negligence. This point was settled long ago for the Metropolis (in *Powles* v. *Hider*, 6 E. & B. 207, if not earlier), and more recently for the country at large (*Bygraves* v. *Dicker*, 129 L. T. 688).

In order to comprehend the situation upon which the Court had to declare the law, one must visualise a procession of five vehicles. All were on the correct side of the road. The first two were not sued. Third came the defendant Mrs. Buckley; fourth came one Walker, who was sued by the original plaintiff. He was exonerated by the Judge (who tried the case alone on Circuit), and got a "Bullock order" for his costs against the other defendants. Last came a taximeter cab owned by the defendant Vaughan, in which the plaintiff Mrs. Croston was a passenger. The third car had to pull up suddenly in consequence of a "hold up" in front. The defendant driving it, showed her stop light, but did not hold her hand in the manner known to the common law and recommended by the Highway Code. Her warning seems to have been enough for the driver of the fourth car, who merely gave her a slight bump as he pulled up. The taxi-cab behind him, carrying the plaintiff, could not pull up in line in time to avoid a collision. He swung out to the right in an endeavour to save himself. Faced with the graver risk of oncoming traffic, he turned in again and crashed into Mr. Walker (No. 4). The plaintiff was badly injured. She sued the owner-drivers of cars 3 (Mrs. Buckley) and 4 (Mr. Walker), and the owner of the cab in which she was driving. As we have stated, the Judge held Mr. Walker free from negligence, and found the other two drivers to blame. On an application made to him under S. 6 (2) Law Reform, etc. Act, 1935, he declared Mrs. Buckley two-thirds and Mr. Vaughan one-third to blame.

The question for the Court of Appeal was whether this was a fair apportionment. Should Mrs. Buckley, who showed her stop light, be held liable at all? Her signal was obviously sufficient to stop the car immediately behind her; but the Judge below seemed to have thought that if she had held out her hand in Highway Code fashion, she would have given the fifth car (the taxi-cab) at least some chance of avoiding the accident. We say "some chance" because the learned Judge did not wholly exonerate the driver of the taxi-cab, but held him to be half as blameworthy as the appellant Mrs. Buckley. The Court of Appeal, after a protracted argument came to the conclusion that

the Judge below was right, or, at all events, not so wrong that his judgment should be varied. With this conclusion Lord Justice Slesser did not agree. He thought that the two defendants were equally to blame, and would have ordered them to pay the plaintiff's loss in equal parts.

If we follow that learned Lord Justice's argument correctly, it certainly seems to lead to the total exoneration of Mrs. Buckley. She pulled up in time to save herself and the car in front of her from collision, and we do not find in the report any evidence to show that she did so with any unnecessary abruptness—in view of the emergency in front of her. However, as she did not bring the driver in front of her into the action, and rely on the *Bywell Castle* rule (4 P. & D. 219) as against him, one might presume that those who advised her thought that such a course of action would be unfruitful. Mrs. Buckley relied for her defence solely on the fact that she showed her stop light and claimed that if anyone behind her was so close as not to be able to slow up, that was "his look-out". The Judge below concluded that by not holding out her hand she brought the car next but one behind her into danger, and this decision has now been affirmed.

As a result of this important decision several points emerge and call for notice. The first is that neither the hand signals consecrated by the Highway Code nor the stop light prescribed by the Stop Light Regulations (S. R. & O., 1935, No. 897) are obligatory. Each is a sign or device recommended for minimising the dangers of the road. If neither is carried or shown, the failure to carry or show may be weighed in the scale as evidence of negligence, but is not conclusive. As Lord Justice Greer said, a man may obey all the rules of the Highway Code and yet be found guilty of negligence. Conversely, he may obey none of them and yet be acquitted of it. The first, last and fundamental duty is to take such care as the jury think should, in the circumstances which exist, be taken. The evidence as to stop lights or hand signals is only a part, not the whole, of the evidence on which they must determine whether a citizen on the road has or has not done his duty. It appears to us that these rules about signals and lights are in an unsatisfactory position. They should find a place in the Construction and Use Regulations, and if infringed be enforced at the risk of a penalty. Secondly, if it is to be the law that the failure to follow the Highway Code is to be conclusive evidence of negligence, Parliament should say so. As things stand in the Highway Code, this is not the position. Indeed, the Code seems to regard the use of hand signals as subsidiary to the use of the stop light. "Signals by drivers," we read, in the Appendix (Messrs. Mahaffy and Dodson quote it in their 1936 Edition, at p. 774), "should be given with the arm extended . . . *where mechanical indicators are not used.*" What other inference can we draw from these words, which under S. 45 (2), Road Traffic Act, 1930, were laid before and approved by both Houses?

Thirdly, practical difficulties and possible inefficiency may attend the application of this strict rule for showing intention by hand signals. The following car may be a little more in to the left than the preceding car which would often make it impossible for the driver behind to see the extended arm of the driver in front. Moreover supposing a moment of "agony" such as that with which the *Bywell Castle* and the *Volute* decisions deal, a driver's first duty may be to use both hands to steer clear of a sudden danger in front.

We need not go to-day into the large question of breach of statutory regulations as evidence of negligence. The law in that matter has been left in an uncertain state by the judgments of the Court of Appeal in *Phillips* v. *Britannia, etc., Co.* (1923, 2 K. B. 832). Little has been done to improve matters by the later decision in *Monk* v. *Warbey* (1935, 1 K. B. 75), and the matter passed without discussion in the much-debated pedestrian crossing place decision of last summer (*Bailey* v. *Geddes* [1937], 3 All E. R. 671). We should like a full-length decision on it by the House of Lords. Let us hope they may decide that every breach of a statutory regulation, at all events on the highway, is conclusive evidence of negligence on the part of one party to a collision unless the other party has been guilty of wilful negligence. This would be a strict rule to lay down, and it might be necessary to invoke the help of our law givers to make it. It would clear the air.—*The Law Journal.*

THE BANK CLERK'S DUTY.

This week Mr. Justice Goddard had another case of a careless Bank clerk before him. We use the adjective merely because the learned Judge came to the conclusion that on the whole the clerk's action or inaction fell short of what was, in the circumstances, proper (*Motor Traders Guarantee Corporation* v. *Midland Bank*, 1937. 4 All E. R. 90). A dishonest person who was it seems, in treaty with the plaintiffs, the drawers of a cheque, for financing a hire-purchase agreement, received the cheque from them. This cheque was made payable to the owners of the article to be hire-purchased—a motor car. The dishonest person either forged or procured the forgery of the payee's endorsement and handed in the cheque to the defendants' clerk to be credited to his own account. The clerk saw, of course, that it was a "third party" cheque and asked how the dishonest person came to be paying it into himself. He received an explanation which he deemed satisfactory and did not take the course which his instructions direct—namely, refer the matter to the manager. Had the dishonest person had an impeccable "banking history" as Mr. Justice Goddard called it, this decision would not have sufficed to fix the bank with negligence. But his banking history was, to put it no higher, tempestuous, with a story of over 30 dishonoured cheques in less than two years. Bank clerks as a rule are scrupulously careful, and no absolute rule or standard can be laid down. But here was a case where something more should have been done.—*The Law Journal.*

A SERIOUS OFFENCE

The trial of a young woman for manslaughter, dangerous driving, and intoxication while driving, which occupied the Judge at Gloucester for some days last week, ended in verdicts of guilty upon the second and third charges and of acquittal on the first. The recent decision of the House of Lords in *Andrews* v. *Director of Public Prosecutions* (1937, 2 All E. R. 552) makes it clear that though a person be guilty of dangerous driving or of driving while under the influence of drink, and death results, he or she need not necessarily be found guilty of manslaughter. On the facts reported, we should not have been surprised if the jury had returned a verdict of manslaughter. Many people would, we think, consider that the acts of the accused person fulfilled the definition of criminal negligence laid down in *R.* v. *Bateman* (19 C. A. R. 8). There was conflicting evidence as to her state of sobriety before and after the accidents, and she was fortunate enough to have several witnesses to speak for her on that charge, but the jury obviously disbelieved them. As the question of sobriety or insobriety is so much a question of degree, it would not be right to question the good faith of the witnesses for the defence. But once the jury decided to reject their story and convict on a grave charge which involved killing two innocent people, we should be prepared for a heavier sentence than eight months' imprisonment and five years' disqualification.—*The Law Journal.*

ACCIDENTS IN AMUSEMENT PARKS

Fun fairs frequently furnish collision-proof motor cars for the amusement of their patrons. In spite of safety devices, an accident may nevertheless happen, as in *Dakin and another* v. *Maxwell & Manners Ltd.*, heard at South-end County Court in May.

The plaintiffs had each taken a 6*d.* ticket at a miniature motor speedway, and had been put into car No. 13. The first plaintiff took the driver's seat, and her only instruction was to put her foot on the pedal. The car went round the first lap in safety, but it was run into violently from behind during the second lap by a car driven by another pleasure-seeker.

The result was that the plaintiffs, having sustained cuts and bruises, claimed, 40*l.* and 30*l.* respectively, as damages. The alleged negligence of the defendants was: (1) failing to provide a rubber protection on the dashboard; (2) adopting a negligent system; (3) allowing the plaintiffs to ride in a car known to be dangerous:

(4) allowing a car to be used so as to constitute a nuisance or trap. The defendants, besides denying negligence and alleging contributory negligence, relied upon a contract formed by the following notice over the pay-office : "Whilst taking every precaution with safety-first tactics, the Company do not hold themselves responsible for injury or loss or damage to your clothing. You ride at your own risk." It was therefore contended that the plaintiffs accepted the risk of injury.

His Honour, Judge Beazley, was not satisfied that the notice was over the pay-office, and he held that it did not form part of the contract. It was however part of the fun that the cars might bump into one another, and the occupants were necessarily cramped. The absence of rubber or protection from the dashboard did not constitute lack of reasonable care in the construction, repair or maintenance of the car. There was no nuisance or trap, and the plaintiffs, having accepted the risk, were subject in the maxim *volenti non fit injuria*. Judgment was given for the defendants.

The extent of the duty owed by the defendants was similar to that laid down in *Maclenan* v. *Segar* (1917, 2 K. B. 325). McCardie, J., was there considering the liability of a hotel-keeper to a guest, who was injured in escaping from a fire by means of a rope of sheets. The learned Judge pointed out that it mattered not whether the subject was a race-stand, a theatre or an inn ; whether it was a taxi cab, an omnibus or a railway carriage. The warranty in each case was the same, and had been defined in *Francis* v. *Cockrell* (1870, L. R. 5 Q. B. 501). Kelly C. B., there stated that one who lets on hire . . any article or thing . . does warrant and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied ; but he does not contract against any unseen and unknown defect which cannot be discovered.

On the question of intrinsic danger, the proportion of accidents to the total number of users is relevant ; in *Sheehan* v. *Dreamland (Margate,) Ltd.* (1923, 40 T. L. R. 155), the plaintiff had been injured by falling off a Luna Ball. This consisted of a balloon which was rapidly inflated and deflated until the persons sitting on it were thrown off. Several thousands of persons had taken part in the performance in two months, but there had only been two accidents. The jury at Maidstone Assizes awarded 1000*l*. to the plaintiff, but the judgment of Avory J. was set aside by the Court of Appeal, on the ground that there was no evidence of negligence for which the defendants were responsible. The man who took the money and issued the tickets was paid by the defendants, but he took his orders from the owner of the side show.

The contingency of the owner of a machine being unable to discharge his liability (when established) arose in *Humphreys* v. *Dreamland (Margate), Ltd.* (1930, 100 L. J. K. B. 137). The appellant was the mother of, and had been partially dependent upon, a passenger who had been killed in an Atlantic Flyer. The machine consisted of a number of boats, hung on to iron rods, which, as they were rotated, went upwards and outwards by centrifugal force. The respondents had appointed the gate keeper to the fairground, and they were sued as owners thereof. The House of Lords held that there was no invitation to the public to enter any particular side show, as all these remained under the control of the concessionnaires of the various spaces. The claim against the respondents, as landlords, therefore failed.—*The Law Journal.*

REVIEWS

Local Investigation and Relaying, *by* SHIBNATH BASU, B.L., Pleader, Howrah. Published by author himself. The book can be had from Eastern Law House, Law Publishers, 15, College Square, Calcutta, Pages 251. Price Rs. 4.8.0.

This is one of the very few books we have on this important and intricate subject. Pleader-Commissioners do find very many difficulties in cases of boundary disputes. The author has treated the subject from all possible points of view. As the author has written this book as a result of actual experiment and patient observation, the book is bound to be of practical help and not merely a theoretical work.

The book will be of great use not only to Pleader-Commissioners but also to the Bench and the Bar.

A Handbook of Company Law (Edition 3), *by* RANJIT H. PANDIA, B.A., LL.B., BAR-AT-LAW, 121, Medows Street, Bombay. Pages about 400. Price Rupees 3.8.0.

The author has done well in bringing out a new edition of this book in view of the recent amendments. He has explained the governing principles of Company law in clear and lucid style with reference to case law wherever necessary without at the same time overburdening with a multitude of authorities. Though the book is mainly intended for students, it will be useful to lawyers and businessmen also. The printing and get up are quite good and the price moderate.

Hindu Women's Rights to Property Act (No. 18 of 1937), *by* KUMUD NATH BHAUMIK, B.L. Published by Eastern Law House, 15, College Square, Calcutta. Pages 64. Price annas 8.

The notes to the sections of this small but important Act are critical and exhaustive. The author's preface is interesting and instructive. The price of the book is very low and is within the reach of all pleaders and students.

A Practical Guide to Criminal Court Practice, *by* A. C. GANGULY, M.A., B.L., Advocate. Published by Eastern Law House, Law book-sellers and Publishers, 15, College Square, Calcutta. Pages 1044. Price Rs. 4-4-0.

This book, we are glad to note, really serves as a practical guide to the beginners of the profession on the criminal side. The author has given a general summary of the important chapters on Criminal Procedure Code, dealt with the offences under the Penal Code which frequently come up, and touched in passing the provisions in the Evidence Act. Besides these, he has included ten minor Acts of daily use in Criminal Courts with useful notes. The author has given some useful tips to beginners on the art of cross-examination. He has also given some model forms of petitions which the beginners will find difficult to draft. On the whole the author has made every attempt to make the book helpful to young practitioners. The printing and get up leave nothing to be desired and the price is within the reach of all beginners at the bar.

The Civil Court Manual, Vols. 1 and 2 (Edn. 6). Published by Madras Law Journal Office, Post Box 604, Mylapore, Madras. The book can be had from Publishers. Pages over 4600. Price Rs. 24.

This Manual needs no introduction to the legal profession. The very fact that it has gone through six editions in the course of a decade bears ample testimony to the growing demand for and popularity of this publication. It has come to be an indispensable companion to every lawyer, junior or senior and the Bench. In Edn. 6, under review, all possible improvements and additions have been made. The numerous and important amendments made by the recent Adaptation of Indian Laws Order in Council passed under the new Government of India Act up to the end of 1937 have been carried out in their proper places. All important Acts published up to August 1937 have also been incorporated. Further, the several provincial amendments of the Court-fees Act and the Stamp Act are also given in extenso. The clear and exhaustive notes of cases have been revised and brought down almost to the end of 1937. The printing is good and the get-up very attractive. Considering the bulk of the volumes and the utility of the publication, the price is very moderate.

Yearly Digest for 1937, *by* R. NARAYANASWAMI IYER, Advocate, Madras. Published by Madras Law Journal Office, Mylapore, Madras, Columns 1616. Price Rs. 4.

In this Digest all the usual good features are retained. All Indian cases reported in important legal journals and select English cases are digested under appropriate headings and sub-headings. The table of index of cases followed, overruled etc., will also be very useful. We recommend this to the Bench and the Bar.

ARTICLES

Adoption by Senior Hindu Widow after Relinquishment of power.

By R. V. V. TATACHARIAR, ADVOCATE, *Madras.*

The Division Bench case in 39 Bom L R 1115=A I R 1938 Bom 1[1] comes in for a large share of criticism. The leading judgment of Divatia J. if at once able and learned, is still unconvincing and wholly unsatisfying ; unconvincing, because it has not dived deep enough, and unsatisfying, because it has not touched the core of the subject. The short judgment of Barlee J. is scrappy and shallow. The former Judge finds that the point for decision never before arose before any High Court in India. Hence he rightly deems it necessary to examine the 'nature' and 'source' of the senior Hindu widow's right to adopt. If he had done full justice to the task, he would have come to different conclusions in consonance with the latest trend of the Privy Council rulings on the subject of adoption.

The questions before the Bench were whether a senior widow could validly relinquish her right or power to adopt a son to her husband in favour of her junior co-widow for any or no consideration, and whether she could not resile therefrom on the ground of the same being opposed to public policy and make an adoption herself when the other has made none. If the learned Judge had decided that relinquishment was contrary to Hindu law and public policy except for reasons mentioned in the sacred texts, he would have been true to law and religion and nearer the truth in the circumstances of the case. I say truth, because the junior widow was rather making a provision for her daughter by the deed of arrangement with the senior widow than entertaining the ghost of an idea of ever exercising her power to adopt for the benefit of her husband's soul.

Now to the aspects of law and religion. Hindu law has been a happy blend of law, religion and morality throughout its long history. As the learned Judge has put it :

> The recent decisions of the Privy Council have laid stress on the religious aspect of adoption which is considered more as a matter of religious duty than a legal right connected with property.

Again we can equally say without fear of contradiction that the Hindu law of the sages knew more of individual and social duties and obligations than of rights and powers and laid greater stress on the former than on the latter ; not that the sages never knew the latter or ever ignored them altogether. But in their scheme of law and jurisprudence, the latter classification of rights and powers was either redundant or mischievous. They avoided it as far as possible.

But in the administration of Hindu law by our British Indian Courts, we are accustomed to hear the echo of European notions of right and wrong as an invasion of rights not only in other fields of law imported from or enacted on the model of the West but even in Hindu law where they are irrelevant or unwarranted. We have been loose and careless with the expression "right to adopt" or "power to adopt". One has only to ask the following questions if only to see the absurdity of it all. Does a widow stand to material gain by the exercise of the power or right, whatever may be the spiritual or other worldly gain by her deceased husband or by herself after death ? Does she not really and immediately lose her own very large woman's estate in her husband's property and go away with a lean maintenance ? What is this wonderful right or power that looks no better than a 'right' to do charity while parting with precious or hard-earned property and makes her the poorer for its exercise ? Is it not just to give the dog a name and to hang it ? Why call it a 'right' and then importing all attendant western notions try to defend its relinquishment as perfectly legal ? Why talk of a 'preferential right' of a senior co-widow, as if she comparatively stands to greater material gain than the junior widow by the adoption of a son to their husband ? If ever nomenclature were entirely responsible for havoc, mischief or failure of justice, one such is easily available here.

Again, like marriage, adoption is not a mere contract but a sacrament superimposed. Both create an irrevocable status immediately after. If a restraint on marriage or a right to marry is illegal and

1. Sadashiv v. Reshma, (1938) 25 A I R Bom 1= I L R (1938) Bom 84=39 Bom L R 1115.

opposed to public policy, then why not a similar restraint on adoption or a right to adopt? But the learned Judges would simply say, on the unsifted strength of certain observations in 45 Mad 266[2], 13 Bom 160,[3] 39 Mad 772[4] and 28 Bom 461,[5] that Hindu law countenances the idea of such a right and the relinquishment thereof. Manu (5.159 & 160) while disapproving of women's re-marriage for the sake of issue to redeem them from hell, nowhere countenances the relinquishment of a positive duty (of adoption) enjoined on a Hindu widow, not allowed to marry and not feeling otherwise competent by the strength of her own resolve to lead the life of a purest celibate to save herself and her husband's soul. (Par. 4·33, Dak. 4·20.)

Again, Yajnyavalkya (1.88), Vishnu (26. 1.7) and Manu (9.85 to 87) clearly and unequivocally enjoin for the reasons stated or apparent therein that the eldest wife (not widow) alone being of the same caste as the husband's shall be required to perform his Dharmic acts and that other wives come in (Daksha, 4·15 and 16) for the satisfaction of his carnal appetite only. It is said of this Dharma-patni or eldest wife of the same caste that on marriage she becomes one with her husband even in flesh and blood and in her he is supposed to survive after his own death. Her duty in behalf of adoption, even as her husband's, cannot be relinquished or delegated except on grounds stated by the texts themselves, or clearly implied in them.

It would appear from them that even where a junior widow's son dies unmarried, or married but leaving no wife or issue behind, thus leaving his mother his reversionary heir, if an adoption is to take place, it can be only made for the benefit of the husband and not the son and that the senior widow alone, if alive, should adopt, of course with the consent of the junior widow as she has become the heir of her son, and that this consent cannot be arbitrarily or improperly refused with a view to clutching at the ancestral estate. The decisions of our Courts have all gone wrong over this aspect and deprived the senior widow of her just "right" or rather inalienable duty or her own "preferential right" as the Courts have egregiously blundered in calling.

If however the senior widow dies, becomes unchaste or is excommunicated, or improperly or out of spite or other ill-feeling to the deceased husband refuses to adopt, then the junior widow is as in a case of extreme exigency or 'apat-dharma' obliged to shoulder the onerous duty for the benefit of her husband in virtue of her being also his own wedded wife. Such 'apat-dharmas' are frequently met with in Shastras in connexion with marriage, secondary sonships, etc. In this view, then, the senior widow cannot rightly or validly relinquish her duty; and to do it for a sordid consideration makes it worse. Both Hindu law and public policy must at once discountenance the same. And in the case under review, the junior widow had no son whom she would on his death succeed, but only a daughter for whose sake she wanted to make provision by depriving the senior widow of all chance of making an adoption herself which would usher in a new heir to the estate in rivalry to her daughter. Her action is nothing short of a fraud upon religion and law relating to adoption and deserves to be condemned and discouraged.

Granting for argument's sake that the senior widow had a "right" to relinquish her duty by the husband in favour of her junior co-widow as a much worthier person and more worthy of their husband, is there no *locus penitentiæ* and room for withdrawal of her consent for any proper reasons before an adoption actually takes place? The learned Judge instead of impeaching the deed of relinquishment as illegal and void in Hindu law and opposed to public policy, calls it "executed" because of the receipt of consideration by the senior widow. One can understand him if an adoption by the junior widow had taken place, when the validity of the two adoptions would fall to be canvassed, and the junior's adoption would have to be defended on the doctrine of *factum valet*. But if her adoption is not yet made in pursuance of the senior's consent, decisions are clear that such consent if given for valuable consideration is void and of no effect; and the portion of the consideration can, if separable from others and not

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2. Muthusami Naicken v. Pulavar Attal, (1922) 9 A I R Mad 106=66 I C 504=45 Mad 266=42 M L J 101.
3. Padaji Rao v. Ram Rao, (1889) 13 Bom 160.
4. Venkatappa Nayanim v. Ranga Rao, (1916) 3 A I R Mad 919=30 I C 106 = 39 Mad 772 =29 M L J 18.
5. Anandi Bai v. Kashi Bai, (1904) 28 Bom 461=6 Bom L R 464.

tainted by illegality or immorality or otherwise, be recovered by the party that parted with it. The Judge calls it "free consent"; but such free consent might exist in all contracts that are immoral, illegal or opposed to public policy.

Lastly the learned Judges turn to discuss whether the right or power to adopt on the part of a Hindu widow is inherent in her or delegated to her from her husband. It is submitted that history shows that neither theory is safe or sound. In either case, the Judges and their predecessors failed to note, the power is inalienable; and if inherent it cannot be delegated; and if delegated there can be no delegation of a delegated power. Barlee J. complains that there is no direct text on the subject and that he has to choose between two fictions : (1) of presumed authority from the husband in the absence of an expressed prohibition from him; (2) of power to adopt being analogous to the power of bearing a child. He chooses the former as a far less violent fiction. And he labours under a difficulty to understand why a woman who has no inherent power to adopt while her husband is living should be supposed to be endowed with that power by the fact of his death, or should lose it on his prohibition before death. The fact seems to be that both the propositions are wrong and have no basis either in the texts or in the hoary history of Hindu law. Perhaps Yajnyavalkya (1.77) and Manu (5.156) can be twisted to suit the prohibition of a particular boy in view for the proposed adoption after his death. But these cannot apply to the prohibition of any adoption at all to him for his sake or for the sake of his own ancestors. It is submitted, he has no authority under the law or religion or even custom, among Hindus.

This leads us on to the history of the law of adoption with reference to the "source" and "nature" of the "power to adopt". The highly commercial people of the Dravidas in South India were thoroughly familiar with notions of gift, sale, exchange, etc. of not only goods, cattle and slaves but of their own children whether in marriage or adoption. The Aryans ridiculed the gift or sale of children (Apastamba 2.13.10), and the Asura marriage was tabooed and the Dattaka form of adoption was slow to rise in the scale of the dozen secondary sonships, but it steadily won the highest place second only to the Aurasa sonship. Vasishtha (15.1) and Bodhayana (7 5, of the Grihya Sutras) refer to the then current notion of property in children by virtue of their birth out of the flesh and blood of their parents, and propose certain checks and balances dictated by the tenor and spirit of Aryan law of joint family coparcenary, inheritance, sraddhas, and the inferior status of women when engrafting the law of adoption from the Dravidian sources. Hence though they admit the equal power of both parents to dispose of children born of their loins, the wife is always subjected to the controlling or superior voice of the man. Though the power began as a temporal or worldly concern, it underwent a serious modification by being intertwined with and engrafted on to the law of Sraddhas to ancestors for whose benefit in chief this recourse to adoption was made. The temporal element is still there but is to be found thrown far into the background. Adoption, like marriage, is no more a mere matter of contract but has long since entered on the phase of being a sacrament. The adopted son is required and expected to become the reflexion of a true son born of his adoptive parents saddled with all his threefold debts and duties to them, their ancestors and to the gods and sages.

Such being the case, it is very difficult and disquieting to import uncouth though not altogether novel ideas from foreign juridical systems into our unique and almost solitary type of legal framework and to tamper and tinker with it so as to make the new additions or developments jarring and altogether out of tune with the basic foundations of our ancient Hindu law and custom. Such wanton or ignorant interference leads but to injustice to the system as a whole and to particular parties to the litigation. The judge-made-law has at present to be more vigilant and scrupulous than in the past as our Legislatures have already begun to interfere piecemeal with the established laws of the land that have stood the test of time with all its incidental and consequential confusion, uncertainty and dismay.

Order dismissing or striking off an Execution Application.

By RACHURI HANUMANTHARAO, *Vakil, Vizianagram.*

It seems to be a well-established practice amongst Courts executing decrees not to allow execution applications pending for long or indefinitely, and to dismiss or strike them off whenever possible or convenient, whether there be sufficient grounds or not, and whether such an order is legal and proper under the circumstances or not. It is no doubt a very salutary principle and practice to execute decrees fully and as early as possible, but it is very undesirable to dismiss execution applications without there being some satisfactory execution, and without there being absolutely no laches or default on the part of the decree-holder. Such orders of dismissal or striking off will in some cases work a real hardship upon decree-holders, who will be consequently put to unnecessary loss, expenditure and annoyance. The passing of such orders has been repeatedly condemned by the High Courts.

There being an order of dismissal on an execution application, the question that is proposed to be considered in this article is, what is the effect of the order on a subsequent execution application for execution of the same decree. Art. 182, Cl. (5), Lim. Act, says that the subsequent application is barred unless presented within three years from the 'final order', on an application for execution or for a step-in-aid of execution. So the question is, is the order of dismissal or striking off the former application a 'final order'.

This leads us to the definition of 'final order'. The phrase had been introduced into the clause by Act 9 of 1927, and was not defined by the Legislature, and therefore became the subject of judicial definition. In A I R 1932 Oudh 148[1] their Lordships, while considering whether a certification of payment under O. 21, R. 2, Civil P. C., at the instance of the decree-holder is a final order, or a step-in-aid of execution, and holding that it is neither of the two, defined the phrase 'final order' thus :

> The words "final order" imply that it should be final as far as the Court passing the order is concerned. It should be an order, which, if not reversed or modified by a Court of appeal, would be binding between the parties.

In A I R 1933 Mad 540[2] his Lordship, while considering whether a second execution application, presented together with the first, returned for correction of certain defects, is in time, did not define the phrase but held that there was no final order on the first, implying evidently that the order returning the first application for rectification of defects is not a final order. In A I R 1934 Pesh 23,[3] while considering whether an order transferring the decree to enable the decree-holder to apply for rateable distribution of assets in another Court is final, and while holding that it is final 'so far as the Court seized with the execution was concerned,' the learned Judicial Commissioner says :

> So far as I see 'final order' means an order which conclusively decides the matter between the parties. For example, in Wharton's Law Lexicon it is stated that 'final order' means a conclusive decision of the Court as distinguished from interlocutory.

In A I R 1936 Mad 613[4] the question that came up for consideration was whether an order returning an execution application for rectification of certain defects is a final order. Discussing the case law in an elaborate and well-reasoned judgment and saying that the order was not final Venkatasubba Rao J. lays down that

> 'final order' is not one made last in point of time, that it must deal judicially with the matter of the petition,

and that it implies that the proceeding has terminated so far as the Court passing it is concerned. The question that was considered in A I R 1936 All 820[5] was whether an order striking off an execution application for partial satisfaction is a final order. The Full Bench reviewing the whole case law on the point, and holding it to be a final order observed as follows :

> The question whether an execution case is still pending and has not been terminated must depend on an interpretation of the order passed by the Court and the inference to be drawn as to the Court's intention. If the Court intends that the matter should be shelved for the time being or the record be merely consigned to the record room

1. Ram Bharose v. Rammanlal, (1932) 19 A I R Oudh 148=137 I C 768=7 Luck 590=9 O W N 209 (F B).
2. Muhammad Abu Bakkar v. Ramakrishna Chettiar, (1933) 20 A I R Mad 540=144 I C 167=64 M L J 401.
3. Punjab National Bank v. Dina Nath, (1934) 21 A I R Pesh 23=149 I C 136.
4. Kesavuloo v. Official Receiver, West Tanjore, (1936) 23 A I R Mad 613=163 I C 354=71 M L J 336.
5. Md. Taqi Khan v. Raja Ram, (1936) 23 A I R All 820=166 I C 106=1936 A L J 1140 (F B).

and be taken up later on by the Court itself suo motu or at the instance of the decree-holders, then obviously the case is still pending and is in a state of suspended animation. On being reminded that the case has not been disposed of, the Court can at any later moment take it up and deal with it. On the other hand, if the execution Court has intended to finish the matter which was pending before it and to dispose of it, then it seems quite immaterial whether the Court proceeded strictly according to the procedure laid down in the Code or whether it acted irregularly or even illegally. So long as the order is not set aside in appeal or in revision, the order must be regarded as one which has disposed the execution proceeding, and therefore it cannot be considered that the proceeding is still pending and can be revived at any time by either of the parties. When the Limitation Act of 1877 was in force there was no provision for the exclusion of the period during which an execution proceeding was suspended on account of any injunction issued by another Court or on account of any stay order passed by an Appellate Court.

In many cases where such orders had been issued, the Courts held that the mere fact that the execution case had been struck off by the Subordinate Court did not amount to a termination of the proceeding, which could therefore be revived after the stay order or injunction was discharged. This difficulty was to some extent cured by the amendment of S. 15, Limitation Act, in 1908, when a special provision was made to meet it. But even then cases arose where an execution case had been pending for more than three years and then owing to some unfortunate circumstance the execution case was struck off and the decree-holder had to apply within three years of the last date of applying in accordance with the law or the taking steps according to law. In several cases it was held by the Courts in India that where the intention of the Court was not to terminate the proceeding the matter could still be revived and there was no need for filing a fresh application. Under the amendment of Art. 182 as made by Act 9 of 1927 the decree-holder has now three years from the date of the final order passed on his application, and he is not bound to come in within three years of the date of the original application made according to law, or of the last step taken in aid of execution. It follows that if there is due diligence, the decree-holder would in the ordinary course during the period of three years after the last order come to know that the execution case is no longer pending and he would not be in the same unfortunate position as he would have been under the unamended article, if the case, after having remained pending for more than three years had been struck off or dismissed on account of some unfortunate circumstance. It seems to us that the actual words used by the Court would not always be conclusive. Certainly the words "struck off" are an ambiguous expression and would not show conclusively either that the Court intended to keep alive the matter or intended to dispose of it finally. In 12 Beng L R 411[6] at p. 422, their Lordships of the Privy Council observed: "The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind."

Their Lordships proceed to say:

We are unable to hold that the words 'final order' must mean the order which finally adjudicates upon the rights of the decree-holder on the one hand and the judgment-debtor on the other.

The question considered in A I R 1937 Mad 385[7] is whether an execution application "rejected" by the Court is a final order. Their Lordships held it to be a final order. Venkataramana Rao J. says:

An order would be a final order within the meaning of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on merits. I agree with my learned brother when he says: "I do not think it can be contended reasonably that the Legislature intended that where the Court chose to pass certain orders which were not final in the sense that they did not deal with the merits of the application it was to be held that there was no final order within the meaning of the amended articles': 1936 M W N 547.[8]

Pandrang Rao J. observes as follows:

It was conceded before us by the advocate for the respondents that if a petition is dismissed because it is not pressed it would be a final order. I do not see why the substitution of the word 'rejected' for 'dismissed' should make any difference in deciding whether the order is final or not. Similarly, if an execution petition is dismissed for default, it would also be a final order. On the other hand, if the other definition is strictly applied, it may be contended that there was no judicial determination of the matter involved in the application and therefore there was no final order. I am unable to accept this as the correct interpretation of the words 'final order' found in Art. 182 (5), Lim. Act. In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point for limitation.

The above discussion reveals a certain amount of uncertainty amongst the several learned Judges as to the exact meaning of the phrase 'final order'. Almost all the decisions referred to above define it as one which is final as far as the Court passing it is concerned. This definition, it is most respectfully submitted, is itself ambiguous. But it can be gathered from the above decisions that a 'final order' is one passed on a judicial determination of the matter of the petition, final as far as the Court

6. Puddomonee Dossee v. Roy Muthooranath Chowdhri, (1873) 12 Beng L R 411=20 W R 133 (P C).

7. Chidambara Nadar v. Rama Nadar, (1937) 24 A I R Mad 385=168 I C 561=I L R (1937) Mad 616=(1937) 1 M L J 453 (F B).

8. Mottayya Padayachi v. Rajagopalan, (1936) M W N 547.

passing it is concerned, and conclusive between the parties, unless modified or reversed in appeal or revision, and not essentially on the merits of the case, the finality thereof depending upon an inference regarding the Court's intention, to be drawn from an interpretation of the order, according to the circumstances of each case, the actual language of the order not being conclusive. In my humble opinion this definition is indefinite and cumbersome, and it would be proper, and sufficiently accurate so as to meet the ends of justice to define 'final order' as an order passed only either after a judicial determination of the matter of the petition, or on a default of the decree-holder.

Applying the definition of 'final order' it must be first decided whether the order of dismissal on the first execution application is a final order. If it is, the second application will be in time provided it is within three years from the order, and within 12 years from the date of the decree. The question is, if it is not a final order, what is its effect on the subsequent application for execution. In this case is limitation for the second application to be reckoned from the last final order, or does the order of dismissal of the first application, not being final, keep it pending to be revived or continued by the second? In the latter case, is there any limitation for the filing of the petition to revive the pending one, and does the 12 years' rule of limitation embodied in S. 48, Civil P. C. apply?

A I R 1921 Cal 594[9] is a case of a second execution application more than three years from the first, but within three years from the date of setting aside a sale held on the basis of the first application. After a discussion of case law, their Lordships observed :

In our opinion, the second application for execution, which was made after the sale held on the basis of the first application had been set aside at the instance of the judgment-debtor, was in essence an application to revive and continue the earlier application, and from this point of view no question of limitation really arises.

The principle of revival of a former application had been clearly stated by the Judicial Committee in 27 All 334[10] thus :

An application for execution may in certain contingencies be treated as one to carry through a pending execution; thus the second application might be treated as one not to initiate a new proceeding, but to revive the previous proceeding when the latter was arrested by reason of circumstances over which the decree-holder had no control.

The principle of revival was definitely and succinctly stated in A I R 1933 Mad. 418.[11] Sundaram Chetty J. says :

Where an execution petition can be deemed to have been not finally disposed of and can be treated as still pending in the eye of the law the subsequent execution application may be treated as one for the continuance of the former one. Where the former execution application was dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable the later execution will be deemed to be one for a revival of the former one. . . . The test to be applied for the principle of revival is that the interruption to the execution proceedings must have been due to an intermediate order, which was afterwards set aside, or the execution proceedings must have been rendered infructuous by some such obstacle and the interruption to the execution should not have been occasioned by any fault or laches of the applicant.

Where a second application returned for rectification of some defects was represented about a year afterwards together with a third application it was held in A I R 1933 Mad 540[2] that

as no final orders on the second application have been passed that application is still pending and at present no question for limitation arises.

The question that was considered in A I R 1935 Mad 803[12] was whether a second application by an auction-purchaser for delivery of property purchased filed within a year after a similar application filed within three years from confirmation of sale was dismissed, was within time. The Full Bench observed as follows :

. . . the decree-holder's application so far as the items other than the house are concerned has never been considered, and has never been decided against him and it is impossible to regard the order on the first petition of September 1930 as an order refusing to deliver the properties to him in such a way as to make it incumbent on him to appeal. It was an order passed only for statistical purposes. The present application of March 1931 must therefore be regarded in the circumstances of the case as a continuation of the petition of September 1930 for delivery of possession of the lands. . . . . As to both these items there never having been any objection by the judgment-debtors and there

9. Jira Bibi v. Majiruddin Chowdhury, (1921) 8 A I R Cal 594=64 I C 849 = 35 C L J 135.
10. Qumar-uddin Ahmad v. Jawahir Lal, (1905) 27 All 334=32 I A 102=2 A L J 397 = 8 Sar 810 (P C).
11. Tripura Sundaramma v. Abdul Khader, (1933) 20 A I R Mad 418 = 143 I C 1=56 Mad 490 =64 M L J 664 (F B).
12. Abdul Aziz v. Chokkan, (1935) 22 A I R Mad 803=159 I C 279 = 58 Mad 893 = 69 M L J 821 (F B).

never having been any adverse order against the decree-holder and there never having been any valid disposal of the petition, the present petition must be regarded either as a continuation of the petition of 1930 or as a reminder to the Court to take up that matter again. In this view the application of the decree-holder for delivery of possession of such items as are still with the judgment-debtors and have got to be delivered is not barred by limitation.

In A I R 1935 Mad 885[13] the question was whether after a first execution application had been struck off for want of bidders, the second application was barred by limitation. The learned Chief Justice said:

> In this case it is quite obvious that the order 'striking off' the petition could not possibly have been an order intended to dismiss the petition. The sale was merely stopped for want of bidders and the Court would have no jurisdiction then and there to dismiss the execution petition on that ground. It was clearly an order made quite irregularly for statistical purposes and I agree with the view of the lower Court here that the subsequent proceedings were merely a revival or continuation of those earlier ones which were irregularly stopped by being "struck off."

In A I R 1936 Mad 437[14] on the basis of the decree-holder's execution application a judgment-debtor was brought under arrest, when the Court granted him time and dismissed the execution application. When assets were realized in execution by another decree-holder of the same judgment-debtor the former decree-holder applied under S. 73, Civil P. C., for rateable distribution. It was held that the dismissal of the execution application was not valid and legal and that in spite of the dismissal the application was held to be pending to satisfy the requirements of S. 73, Civil P. C. In A I R 1936 Cal 239[15] the question considered was whether a second execution application, filed more than three years after the suit, in which an order of injunction restraining the decree-holder from executing the decree was obtained, and in consequence of which injunction the first execution petition was dismissed for the time being, was dismissed, was in time. Holding that it was in time, their Lordships held:

> When an execution case is still pending, but cannot be proceeded further by reason of an injunction and has been "struck off the file," or is removed by an order which does not terminate it finally, but has the effect of only removing it from the list of pending cases, we do not see why it must be said that the decree-holder is bound to apply for revival of the said proceedings after the removal or the discharge of the injunction. His application in substance only conveys to the Court the information that the bar has been removed. It is also the duty of the Court to have in sight all undisposed cases, and when the bar is removed to direct the party to take necessary steps for further progress of the case.

In A I R 1936 Mad 613,[4] the decree-holder, after his first execution application was dismissed for default, filed a series of execution applications, each within three years of the preceding one, and each of which was returned for rectification of some errors, but never again represented, and their Lordships had to consider whether the last execution application was within time. Holding the order of return on the applications to be not "final order," with which of course we respectfully agree their Lordships held that the third application was barred by limitation, computing the period of three years' limitation from the last "final order" on the first application, thus completely ignoring the subsequent ones.

13. Jagannadha Naiko v. Hari Hara Maha Patro, (1935) 22 A I R Mad 885=158 I C 829.
14. Ramanatha v. Akaganan, (1936) 23 A I R Mad 437=163 I C 209=70 M L J 683.
15. Kristo Kamini Debi v. Girish Chandra, (1936) 23 A I R Cal 239=162 I C 654=63 Cal 57=39 C W N 1030.

(To be continued.)

REVIEWS

Victorious India *by* DR. S. V. KETKAR, M. A., PH. D. Published by Maharashtriya Jnanakosh Mandal Ltd., Poona 4. Price Rs. 2.

The author of this book who unfortunately passed away before it was published is reputed for his peculiar ways of thinking and for his indomitable courage in giving expression to his independent views and judgment. He declares that with the passing of the Government of India Act, 1935, India has become a free and independent Empire and he further claims for himself the sole responsibility and credit for the passing of the Act. The former is open to question and the latter hard to believe; and it is extremely doubtful whether the reader will be impressed, far from being convinced, with the line of reasoning and arguments advanced by the author to substantiate them.

His view of Mahatma Gandhi is not likely to appeal to most of the readers. In his eye, Gandhi is only "a man of common-

place intelligence" and does not possess anything great. Finding with great discomfort Gandhi as leader of the Congress and the Congress not inclined to "expel him with a vote of censure and disgrace," he wanted that the Congress must end "if Gandhi's leadership and his power of mischief are to come to an end" and to secure this object, he started proceedings against the Congress.

Though the author might have been prompted by the best of motives and honest convictions in his activities, it has to be admitted that the author and people of his way of thinking will be found to form, at best, only a negligible minority. Any how the author's courage in bringing out such a publication before the public the majority of which, he fully knows, are opposed to his views and trying to convince them with his own facts, reasoning and arguments deserves to be appreciated and the book affords interesting reading.

The Indian Conveyancer *by* P. C. MOGHA, B.A., LL.B. Published by Eastern Law House, Calcutta. Price Rs. 10.

This book is the first of its kind in India, though there are excellent books of English precedents. The work of drafting deeds is generally done by untrained deed writers who have no knowledge of law, and lawyers are rarely consulted. Even when they are consulted in complicated matters, they find it difficult to give proper advice as their training is more in interpreting the words used in a deed rather than drafting deeds using appropriate words or expressions. The author has set out forms for deeds of every day use in India in simple language without use of highly technical expressions as far as possible. Further he has given the general principles of conveyancing and usefully added notes regarding provisions of stamp and registration laws. The book is bound to be of great use to lawyers and businessmen. The printing and get up are good.

The Law and Practice of Divorce *by* S. C. MANCHANDA, M.A. (CANTAB.), BAR-AT-LAW, Advocate, High Court, Lahore, Published by The Eastern Law House, Calcutta. Price Rs. 12.

The author has given as complete an account as possible on the statute law relating to divorce of persons living in India. The book has been divided into three parts. The first part gives the Indian Divorce Act as amended up-to-date with exhaustive and critical commentary. The second part is devoted entirely to the all important subject—the Practice of Divorce. The third part is devoted to a Commentary with case law on the Indian and Colonial Divorce Jurisdiction Act, 1926, the Indian Non-domiciled Parties Divorce Rules, 1937 and the Parsi Marriage and Divorce Act, 1936. The Matrimonial Causes Act, 1937 and the Matrimonial Causes Rules of 1937 are also given. The author has usefully given copious marginal notes and synopsis of the Commentary under each section which will greatly facilitate reference. The index is exhaustive and well arranged. The book is bound to be highly appreciated by the legal profession.

The Ajmer Law Digest, 1936, *by* JYOTI SWARUP GUPTA, Advocate, Ajmer. Published by the Secretary, Bar Association, Ajmer, Pages 363.

This is a Digest of all cases reported in the Ajmer-Merwara Law Journal and other cases from Ajmer-Merwara decided by the Judicial Committee of the Privy Council on appeal or the High Court of Allahabad on reference which have been reported in other Law Reports. The cases have been Digested under appropriate headings and the points clearly brought out.

The Valuation of Real Property *by* A. K. MIRAMS. Published by Butterworth & Co. (India) Ltd., P. O. Box 251, Avenue House, Chowringhee Square, Calcutta. Pages 478, Price Rs. 17.

In this book the author has presented in a clear and intelligent form the principles of Valuation of Immovable Property. He has also summarised in an analytical manner judicial and other decisions relating to the Law and Practice of the valuation of the real property. He has usefully added his own note at the end of such cases. The book will be of immense use to the young Valuer particularly in India as well as to the large circle of Pleaders and Barristers and Government servants who have to deal with cases of compulsory and other forms of acquisition of Real Property.

ARTICLES

Order dismissing or striking off an Execution Application

By RACHURI HANUMANTHARAO, *Vakil Vizianagram.*

(Continued from page 39.)

It is humbly submitted that this view is erroneous, and works a real hardship on the decree-holder, because the subsequent applications being evidently not disposed of by a final order, ought to have been held to be pending, and the third application to be a revival of the second and so on. In fact their Lordships say :

> If the execution proceeding has ended the final order gives the starting point ; if on the other hand, execution has been suspended by no default of the decree-holder, he can, treating the petition as a pending one, apply to have it revived without being hindered by any rule of limitation.

No doubt it seems that non-re-presentation of the returned petitions appears to be a default of the decree-holder, but it is rather inconceivable how an order of return, which is evidently not final when it was made, could subsequently become final. In A I R 1936 All 820,[5] their Lordships said :

> If the Court intends that the matter should be shelved for the time being or the record be merely consigned to the record room and be taken up later on suo motu or at the instance of the decree-holders, then obviously the case is still pending, and is in a state of suspended animation. On being reminded that the case has not been disposed of, the Court can at any later moment take it up and deal with it.

From these decisions it is clear that in cases where there is no "final order" on an execution application, the order dismissing it or striking it off is only an interlocutory order suspending the execution application, and keeping it pending, to be revived by a subsequent application by the decree-holder, which is not barred by the rules of limitation provided in Art. 182 (5) or S. 48, Civil P. C. Evidently the subsequent application would be to revive the pending application only if it asks for the same relief, otherwise it would be a new application, which would be barred by limitation : A I R 1932 All 273.[16] But the question is how long does that petition remain suspended, that is, is there any time limit for the decree-holder to apply for a revival or continuation of the suspended application. Regarding this question there is a divergence of judicial opinion, some cases holding that Art. 181, Lim. Act, applies, the others holding that no rule of limitation whatsoever governs that subsequent application, and that therefore the suspended application remains in that suspended state indefinitely. This question, the applicability of Art. 181, Lim. Act, to applications of this nature, to revive a pending but suspended execution application, came up directly for consideration before their Lordships of the Calcutta High Court in A I R 1936 Cal 239.[15] Their Lordships after a consideration of this conflict of opinion, came to the conclusion that the Article does not apply to such applications, and there is no time limit for such application. It was observed as follows :

> It could hardly be contended with any show of reason that an application which was filed in time can subsequently become barred by limitation.

So, the conclusion is, if the order dismissing a first execution application is a final order, the most frequent determining factor in the decision of which being the existence or non-existence of any default or laches on the part of the decree-holder, a second application has to be filed within three years from the order and within 12 years from the decree, and if it is not a final order, the first application would remain pending indefinitely, till the decree-holder revives it by a subsequent application asking for the same relief, and for this subsequent application there is absolutely no time limit.

16. Gobardhan Das v. Dau Dayal, (1932) 19 A I R All 273=138 I C 583=54 All 573=1932 A L J 365 (FB).

STATUS OF KAYASTHAS AS KSHATRIYAS

By B. D. KATHALAY, B.A., LL.B., *Pleader, Nagpur.*
(Member of the Delhi University Court.)

The subject of this article is, "Status of Kayasthas as Kshatriyas." The question of the exact position of an individual or a community in the Hindu social fabric is as old as the Puranas.[1] The institution of caste is still the foundation of Hindu society. It is the guiding principle to determine the domestic, legal, religious and social position of a Hindu. The position of the Kayasthas in the Hindu society is not yet out of the range of controversy. It is agitating the minds of both scholars as well as laymen. There is no consensus of judicial opinion on the point. In such a state of affairs it is in the interest of the society in general and the Kayasthas in particular, to discuss the question from legal and historical point of view. Hence the attempt.

2. *The necessity of discussing the legal and social position of the Kayasthas.*— The question whether the Kayasthas belong to the regenerate classes or not is a question which is important not only from legal point of view but also from social standpoint, and the latter has more importance than the former from the point of view of the layman, who does not interest himself as regards the law by which he is governed. If the Kayasthas are Shoodras, their illegitimate sons become entitled to inherit the property of their father and they can adopt daughter's son or the sister's son. These are the two points upon which the law applicable to the Shoodras differs from that which is applicable to the Dwijas. In other respects, the law applicable to all members of the Hindu Community is the same. The question of their status in the society is however of greater importance.

3. *The divergence of judicial opinion regarding the status of Kayasthas as members of the regenerate classes.*—On the question of the status of the Kayasthas, the Judicial authorities have entertained opposite views. The Calcutta High Court generally incline to hold that the Kayasthas in Bengal are Shoodras and that a marriage between them and the other sub-sections of the Shoodra community is valid.[2] The basis of the various decisions of the Calcutta High Court is a passage from the often quoted Sham Charan Sarkar's Vyawastha Darpan, which is to the following effect:

> There is therefore a preponderance of authority to evidence that the Kayasthas, whether of Bengal or of any other country (at least those of Bengal) have been degenerated and degraded to Shoodradom not only by using after their proper name the surname "Dasa" peculiar to the Shoodras, and giving up their own which is "Varma," but principally by omitting to perform the regenerating ceremony, 'Upanayana' hallowed by Gayatri.

The Allahabad High Court[3] and the Patna High Court,[4] after a long and exhaustive inquiry came to a different conclusion. In the Madras Presidency Kayasthas are not to be found and the Madras High Court did not get an opportunity to shed light on this important topic. It is however interesting to note that the Brahman scholar, Rajkumar Sarwadhikari maintained the view that the Bengal Kayasthas are not Shoodras, but they belong to the Kshatriya caste.[5] Sarkar, an author of great repute, holds similar view.[6]

4. *The epithet "Das" not sufficient to show that a person is Shoodra.*—A Kayastha cannot be called a Shoodra simply because at some time or another either his

1. The story of terrible war between Viswamitra, a Puranic king, who is said to have become a Brahman by performance of penance, and Vasistha is elaborately described in the Puranas.

2. Rajkumar Lal v. Biseshwar Dayal, (1884) 10 Cal 688.—The Bihari Kayasthas are Shoodras. Asita Mohan Gosh v. Nerode Mohan Gosh, (1917) 4 A I R Cal 292=35 I C 127=20 C W N 901.
Bishwanath Gosh v. Sarasi Bala Dasi, (1921) 8 A I R Cal 48=66 I C 590=48 Cal 926=25 C W N 639.—Marriage between Kayastha and "tanti" caste valid.
Bhola Nath Mitter v. Emperor, (1924) 11 A I R Cal 616=81 I C 709=25 Cr L J 997=51 Cal 488=28 C W N 323.—Validity of marriage between a Kayastha and a Dom.

3. Tulshi Ram v. Bihari Lal, (1890) 12 All 328 at page 334 (F B).

4. Ishwari Prashad v. Hari Prashad Lal, (1927) 14 A I R Pat 145=106 I C 620=6 Pat 506=8 P L T 34—The Kayasthas of Bihar belong to one of the three regenerate classes and are not Shoodras.

5. Sarwadhikari's Hindu Law of Inheritance (1922) Edn. 2, p. 381—The Kshatriyas are divided into two classes, the military class and the civilian class. The civilian classes are what are called Upa-Kshatriyas and are known as Kayasthas.

6. Sarkar's Hindu Law (1927) Edn. 6, page 143.—The Kayasthas are not Shoodras.

father or his ancestor or ancestors chose to call themselves by the epithet "Das".[7]

5. *The expression "Das" means an artisan as stated in Nirukta, and not slave or Shoodra as is generally supposed to be.*—The earliest reference to the word Das (दास) is probably in Rigveda Samhita (I. 32. 11), where it occurs in combination with another word Patni (पत्नी), the compound word being "Dass Patni". In commenting upon this word it is stated in Durgacharya's commentary that the word *Das* means an artisan. Dasah Karmakarah (दास : कर्मकार:).[8]

6. *Shyama Charan Sarkar does not accept the view that Kayasthas are offspring of a mixed marriage.*—Shyama Charan Sarkar does not accept the view that a Kayastha is the offspring of a mixed marriage or that he is "Karan". He is decidedly of opinion that the Kayasthas are Kshatriyas and this is so according to the Smritis and Puranas. He however says that they have degraded themselves to Shoodradom by omitting to perform the Upanayana ceremony.[9]

7. *Decisions holding Kayasthas to be Kshatriyas.*— In a famous case[3] (to which reference is already made) decided by a Full Bench of the Allahabad High Court consisting of five Judges, it was held that according to the Benares School of Hindu law, a Hindu widow cannot make a valid adoption to her deceased husband without his express authority; that an adoption actually made by her without such express authority is illegal and void; and the maxim *qued fieri non factum valet* is inapplicable to such an adoption.[10] It was observed by Mahmood J.:

> I wish to premise that notwithstanding the ruling of a Division Bench of the Calcutta High Court,[11] I entertained considerable doubts as to the soundness of the view which seems to have been adopted by both the Courts below, that the literary caste of Kayasthas in this part of the country, to which the parties belong, falls under the category of Shoodras, as understood in the division of mankind in the Institutes of Manu, or elsewhere in authoritative texts of the Hindu law. The same question was subject of a long and exhaustive inquiry by the Patna High Court in which the Allahabad view was followed and the Calcutta view was dissented from. It was found that the Kayasthas of Bihar belong to one of the three regenerated classes and are not Shoodras. The mere non-observance of the orthodox practices cannot take away the rights of Kayasthas in matters of inheritance, marriage and adoption.[12]

8. This erudite judgment extends over forty-six printed pages of the report and those who are interested in the subject can profit by perusing the same. The decision is sound but the reasoning upon which it is based is open to serious criticizm if the question is looked upon from a broader point of view. The High Court held, as stated at pp. 512 and 514 that assuming for the sake of argument that the Kayasthas of Bengal are Shoodras, the Kayasthas of Bihar are Kshatriyas on the ground that the Kayasthas of Bihar are different from other Kayasthas as they have not adopted the surname of "Dasa". As a matter of Hindu Jurisprudence, Kayasthas are either Kshatriyas or Shoodras. They cannot be Shoodras in one province and Dwijas in the neighbouring province. The arguments stated in the judgment of the Patna High Court, in favour of holding the Kayasthas to be Kshatriyas, appear to be commendable to reason and commonsense and strong enough to support the contention that Kayasthas as such, whether they are from Bengal or any other part of India form one community which is entitled to be regarded as a section of one caste.

9. *No judicial pronouncement regarding the status of Kayasthas by the Judicial Committee of the Privy Council.*—The Judicial Committee refused to give their assent to a decision,[13] that the Bengali Kayasthas are Shoodras and left the question open in the following words :

> One contention was as to the rights of succession of persons who were by caste Bengali Kayasthas. It has been found not on evidence, but following some decisions of the High Court at Calcutta, that Bengali Kayasthas are Shoodras. Their Lordships do not think it necessary to decide whether or not Bengal Kayasthas are Shoodras, or to decide as to the construction of a text of the Dattakchandrika which has been referred to by

7. Ratanchand v. Anandbai, (1933) 20 A I R Sind 53 (56)=145 I C 777.
8. Nirukta by Durgacharaya, Adhayaya 7, Placitum 5, Anandashrama Sanskrit Books series (Poona) 1921 edition, p. 179.
9. Ishwari Prashad v. Hari Prashad Lal, (1927) 14 A I R Pat 145=106 I C 620=6 Pat 506=8 P L T 34.
10. Tulshi Ram v. Behari Lal, (1889) 12 All 328 (F B).
11. Raj Kumar Lal v. Beseshwar Dayal, (1884) 10 Cal 688.
12. Ishwari Prashad v. Rai Hari Prashad Lal, (1927) 14 A I R Pat 145=106 I C 620=6 Pat 506=8 P L T 34.
13. Asita Mohan Ghosh v. Nirod Mohan Ghosh Maulik, (1917) 4 A I R Cal 292=35 I C 127=20 Cal W N 901.

the Courts below as applicable to the Bengali Kayasthas. Their Lordships are of opinion that the rights of the parties depend on the construction of the agreement upon which Kumar Narendra Chandra Roy gave his son Sailendra Mohan Ghosh to Radha Mohan Ghosh in adoption.

10. *Degradation among the Kshatriyas, because of their being not in touch with Brahmans, from the times of Manu.*—The Samurayis of Japan are playing a great part in world-shaking events. In Hindustan where there are enough money and men, but where the man has not befriended the most efficient machines of destruction, the existence of the warrior caste—the Kshatriyas—as a whole has been questioned by 'aymen as well as writers. As pithily put in a Sanskrit expression, कलौ आद्यन्तयो : स्थिति : "In the Kali Yuga, the first caste that is the Brahmans and the last caste i. e., the Shoodras alone exist," and the other castes, i. e., the Kshatriyas and the Vaishyas do not exist. How can any one blame these persons when the present state of Hindustan can be described by the lines, which Ovid wrote centuries ago :

> Come peace, and spread abroad thy gentle reign,
> Through all the distant lands of Earth ;
> Let soldiers bear no arms, save to restrain,
> Nor trumpet sound, except in mirth.

It has been a long standing complaint—a complaint as old as the times of Manu—a complaint which has persisted throughout thirty centuries—that several Kshatriya castes have degenerated. As stated in Manusmriti.[14]

> शनकैस्तु क्रियालोपादिमा : क्षत्रियजातय : ।
> वृषलत्वं गता लोके ब्राम्हणादर्शनेनच ॥
> पौण्ड्रकाश्चौड्द्रविडा : काम्बोजा यवना : शका: ।
> पारदा : पल्हवाश्चीना : किराता दरदा : खशा : ॥

The various races called Paundrak, Audra, Dravid, Kamboj, Yavana, Shaka, Padada, Palhava, China, Kirata, Darada and Khasha have gradually been incorporated among the Shoodras on account of the fact that they did not perform the acts, which they were enjoined to perform and on account of their being not in touch at all with the Brahmans.[15]

The process is still continuing.

11. *The Privy Council judicially recognized the existence of Kshatriyas in the "Kali Yuga" in the year 1887.*—In a case regarding the possession of the *raj* and zamindari of Ramnagar in the district of Sarang in Central India, the passage कलौ आद्यंतयो : स्थिति : "In Kali Yuga, the first caste, that is the caste of Brahmanas and the last caste, that is, the caste of Shoodras alone exist", was brought to the notice of their Lordships of the Judicial Committee of the Privy Council.[16] It was held in that case that Kshatriyas did exist and that the Rajputs of Central India were governed by the laws and customs applicable to the regenerate classes. Referring to various authorities in support of the view that the Kshatriyas did not exist and including the passage referred to above, Right Honourable Sir Edward Ryan, while delivering the judgment of the Privy Council, observed at pages 46 and 47 that :

> Whatever weight may be due to these authorities in support of a speculative opinion entertained, perhaps, by learned Brahmans and others, their Lordships have, nevertheless, no doubt that the existence of the Kshatriya class, as one of the regenerate tribes is fully recognized throughout India, and also that Rajpoots in Central India, and in this District are considered to be of that class.

12. *Raja-Tarangini, an historical work composed in the 11th century, referring to a Kayastha dynasty reigning for 260 years.* — A Sanskrit work, which may be described as a book of history without any fear of contradiction, gives the history of Kashmir. This work was composed in the 11th century. In Ch. 4, there is an account of a Kayastha dynasty that reigned there for 260 years from the 6th to the 9th century. The Kings of that Kayastha dynasty are described as Kshatriyas in many places of that work. It is stated therein that from ancient times the Kayasthas held the highest offices such as those of Minister of war or peace, the officer in charge of the Treasury, the Commander-in-Chief, and the Chief Minister superior to all[17].

13. *Inscriptions dating from 738 to 1200 A. D. referring Kayasthas as writers by profession.* — The earliest reference to Kayasthas appears in an inscription in Malwa dated A. D. 738-739. The inscription is of a Maurya King, and the term

14. Manusmriti, Adhayaya X, Slokas 43 and 44.
15. There is a slight difference between my translation and the translation given in Sacred Books of the East Series, Vol. 25, p. 412 ; where the expression "Kriyalopat" is translated as "in consequence of the omission of the Sacred rites".
Radhamadhvavilasachampu, Edited by V. K. Rajwade, Introduction, p. 139 (Chitra Shala Press, Poona, edition)—in Marathi—where it is pointed out that some Kshatriyas became Vrishalas because of "Kriyalopa".
16. Chuoturya Run Murdun Syn v. Sahub Purhulad, (1857) 7 Moo I A 18 at p. 46 = 4 W R P C 132 (P C).
17. Sarkar's Hindu Law of Adoption (Tagore Law Lectures for 1888) Edn. 2 (1916) p. 419 C., referring to Taranga—IV, Shloka 710 Taranga VIII, Shlokas 475, 562 to 564 and 664.

Kayastha is used there as a proper noun to mean a writer. Another inscription dated A. D. 987 is written by a Kayastha named Kanchana.[18] They are also frequently mentioned in the inscriptions dating from the year 1000 to the year 1200 A. D. as writers of inscriptions.[19] They seem to be divided at this time into sections according to the country of their residence, like the Brahmans.

14. *Inscriptions in Ceylon, Central India and South India mentioning Kayasthas as Ministers of war and peace or men belonging to the caste of writers:* — It is a noticeable fact that the "Sandhi", "Vigrahi" or Ministers of war and peace, and the secretary, were always Kayasthas, or men of writer caste. This not only occurs in the Kataka Plates, but in grants or inscriptions found in Ceylon and Central India.[20] Sometimes one comes across Kayastha writers in inscriptions from Southern India, as in the Kokan Inscription of Aparaditya.[21] From the inscriptions in a temple which was first opened in Samwat year 1199 or A. D. 1142 in the town of Gorhwa,[22] it seems that it was built by Rana Pala, the son of Kunda Pala, a Sriwastaw Kayastha. According to tradition the builder of the temple was the Minister of the ruling Raja.[23]

15. *Reference to Kayasthas in ancient works since times immemorial.*—The English aristocracy is sufficiently satisfied if it can trace its descent from the year 1066, the year when William the Conqueror conquered Britain. The people in India have their origin described in books written in remote antiquities. The Kayasthas are described in Puranas, for example, in Padma Purana, Uttar Khanda, where it is described that Chitragupta had twelve sons and that Kayasthas are Kshatriyas and are entitled to all *sanskars*. Bhavishya Purana deals with the duties of Chitragupta. The same story is found in all the Puranas. The Vigana Tantra as well as Brihat Brahma Khanda directed the Kayasthas, who sprang from the body (Kaya) of Brahma, to perform all the *sanskars* of Kshatriyas. Sakanda Purana gives an account of Raja Chitra who is also known as Vivaswan, Aditya or Mitra. Garuda Purana contains the description of Yamapuri where Chitragupta holds his imperial throne.

16. *Reference to Kayasthas in Smritis and commentaries.* — In Yajnawalkya Smriti, Acharadhyaya, Shloka 336,[24] it is observed by that great sage that the king should protect his subjects from the oppression of the Kayasthas. Vijnaneshwara,[25] the author of Mitakshara, as well as Apararka,[26] give the reason for the above observation that the Kayasthas were favourites of the king and therefore likely to escape from the strong arms of the law. The honour of being favourites of the king in the twentieth century of the Christain era has gone to a well-known community in India. As regards the place of Kayasthas in the Hindu Community itself, it has been though not the best, yet the second best. Yajnawalkya said :

ब्रम्हक्षत्रियविट्शूद्रा वर्णास्त्वाद्यास्त्रयो द्विजा : ।
निषेकाद्या : श्मशानान्तास्तेषां वै मन्त्रत : क्रिया : ॥

The Brahmana, Kshatriya, Vaishya, and Shoodra : (these are) the classes and (of these) the three (first) are dwijas or twice-born. Their ceremonies from conception to the funeral (are performed) with Mantras,[27]

18. Russell's Tribes and Castes of the Central Provinces, (1916) Vol. III, pages. 404, 405.
19. The Indian Antiquary, Vol. XIX (1890) p. 218 at p. 219—this was written at the King's command by Sripati, the son of Mahava, a Kayastha of Gauda descent.
The Indian Antiquary, February, (1876) p. 55 at p. 58 — Kayastha Mahuka, who has inscribed these letters. The plate is dated as Samvat 34 equal to B. C. 23, but some scholars think that the date of the plate is A. D. 978.
The Archaeological Survey of India by Cunningham (1873) Vol. III, pages 60, 61. And also page 58.
20. The Indian Antiquary, (1876) February, page 55 at page 57, Note.
21. The History of Mediaeval Hindu India by C. V. Vaidya, (1926) Vol. III page 391.
22. The town of Garhwa is 15 miles to the South East of Kausambi, the same distance to the South West of Bitha, and 25 miles to the South West of Allahabad.
23. Archaeological Survey of India by Cunningham (1873) Vol. 3, pages 60, 61—In this temple, near the images of Brahma, Vishnu and Shiwa, there is a large statue of the Raja on horseback, which is valuable for ascertaining the Hindu military costume half a century before the Mohammadan conquest. The statue represents Sankara Deva, the Baghal Raja of Bara.
24. In the edition of the Yajnawalkya Smriti published by Anandashram Sanskrit Granthawali Vol. 46, this shloka is numbered as 334; see page 584 of Vol. 1.
25. The Mitakshara, Nirnayasagar Press Edition, page 104, where it is observed :

कायस्था लेखका गणकाश्च ते : पीड्यमाना विशेषतो रक्षेत् ।

26. Yajnawalkya Smriti with Apararka's Commentary, published by Anandashrama Sanskrit Granthawali (1903 edition) page 584.
27. Yajnawalkya Smriti, Acharadhayaya, shloka 10.

and the Kayasthas have the privilege of belonging to the Kshatriya caste. The Kayasthas are stated to be writers by the Mitakshara,[28] and Apararka[29] classes them as revenue collectors. Brihaspati, Vishnu,[30] Vrihat Prasara,[31] Shukraniti,[32] Vyas, as cited in Vaijayanti, Virmitrodaya, described Kayasthas as writers or accountants.

17. *The origin of the twelve sub-castes of Kayasthas.*—The common ancestor of the Kayastha people was Chitragupta. He married Irawati, a daughter of Dharma Sharma and Sudhakhina, the daughter of Manuji the son of Surya. He had 12 sons—Bhanoo, Vibhanu, Vishwabhanu, Virjawan, Charu, Cucharu, Chitru, Matiman, Himavan, Chitrabharu, Arun and Atindriya. The 12 sub-castes of Kayasthas have descended from these 12 sons, Srivastava from Bhanoo, Surajdhawaja from Vibhanu, Asthana from Vishwabhanu, Balmiki from Virjawan, Mathur from Charu, Gaur from Sucharu, Bhatnagar from Chitra, Sakseena from Matiman, Ambastha from Himavan, Nigam from Chitracharu, Karan from Aruna and Kulserestha from Atindriya.

18. *Modern writers considering Kayasthas as Kshatriyas.* — Bhattacharya,[33] Britannica Encyclopaedia,[34] Crooke,[35] Nesfield,[36] Sarkar,[37] Sarwadhikari,[38] and Russel,[39] consider that the Kayasthas belong to the regenerate classes.

19. *Kayasthas in Maharashtra.*—In the Marathi language there is a saying that all the five fingers of man's hand are not equal. The sections of the Kayastha community are found scattered over the various parts of India and their position in all these parts is not exactly similar. As regards the Kayasthas in Maharashtra, they have wielded the pen and the sword with equal facility. In times of Shivaji and later on, the Kayasthas like Baji Prabhu and others, to use the expression of Gibbon,[40] "with stout hearts and iron hands asserted the civil and religious freedom of their posterity". They played a very important part in building up the Maratha Empire by fighting battles with that heroism of which even the Mahabharat heroes would be proud. But Maharashtra is in the western part of India and to misapply a well known quotation:

"East is East and West is West,
And the twain shall never meet."

A different state prevails in Bengal.

20. *Reconstruction of Hindu Society by the United Efforts of Brahmans and Kayasthas.* — It has been already pointed out that the Modern Bengal scholars consider Kayasthas to be Kshatriyas. In the earlier days the Kayasthas were very much in favour of Buddhism and they wrote large number of treatises in support of that religion. But after the disappearance of Buddhism from Bengal soil, they cast the whole weight of their influence on the side of Brahmans,[41] and began to translate Puranas, etc., into Bengali. Krishnamangala by Gunaraja and the Mahabharat by Kasiram Das have helped the Bengalis in reforming their national character. Gadadhara and Krisnadasa, two brothers of Kasiramdasa, have also written excellent books. The sole object of all these authors was to make Bengalis Hindus or Brahmanists. The Kayasthas did not confine their usefulness only to authorship. They were landlords of Bengal and as such they did much to help the cause of the Brahmans. Rayamukuta could not have done anything if he had not been supported by Raja Ganesa and his son. Chaitanya could not have organized his sect if he had not been supported by Hiranya and Goverdhan, the Rajas of Salegaon. Thus a Hindu Society was reconstructed in Bengal by the united efforts of Brahmans and Kayasthas, a strong Mahomedan Government notwithstanding.[42]

28. The Mitakshara, Nirnayasagar Press (edition 1926) page 104.
29. Yajnawalkya Smriti with Apararka's Commentary, published by Anandashrama Sanskrit Granthawali (1903 edition) page 584.
30. Vishnu, Chap. 7, verse 3.
31. Vrihat Prasara, Ch. 10, shloka 10.
32. Shukraniti, Ch. 22, shloka 420.
33. Hindu Castes and Sects, (1896) Ch. 9. pages 175, 176.
34. The Encyclopaedia Britannica, (1929) Edn. 14, Vol. 13, page 301.
35. Tribes and Castes of the North Western Provinces and Oudh, Vol. 3, pages 184 to 213.
36. Review of the Caste System in the North Western Provinces and Oudh, (1885) page 132.
37. Sarkar's Hindu Law, (1927) Edn. 6, page 143.
38. Sarwadhikari's Hindu Law of Inheritance, (1922) Edn. 2, page 381.
39. Tribes and Castes of Central Provinces, Vol, 3, page 400.
40. Decline and Fall of the Roman Empire. Ch. 52 page 400, Vol. 5 of the Every Man's Library series.
41. For Racial affinities of the three Bengali castes, for example, the Rarhi Brahmins, the Dakshin Rarhiya Kayasthas and the pods of the 24 parganas, *see* Census of India, (1931), Vol. 1, Part 3, page 39 (xi).
42. Contribution of Bengal to Hindu Civilization by Mahamahopadhyaya Haraprasad Shastri, in Journal of the Bihar and Orissa Research Society, Vol. 6 (1920), pages 54, (67, 68).

21. *Kayasthas in Bundelkhand, Gujrath, Rajputana and the Punjab.*—Kayasthas are found in Bundelkhand, Gujrath, Rajputana and the Punjab and they are in small numbers. They are immigrants from their original home, which is Hindustan, that is, the United Provinces and a part of Bengal.[43]

22. *Similarity of social rules between the Kayasthas and the Dwijas.*—It has been laid down by Yajnawalkya,[44] that the ceremonies of the dwijas from conception to the funeral are performed with Mantras. If this test is applied to the Kayasthas it is found that the Kayasthas believe in and perform all the *sanskars* with the help of the Mantras. According to the Viramitrodaya the scribes and accountants are dwijas and the fact that the Kayasthas wear the sacred thread supports this contention. They read Vedic Mantras on occasions of offering homa, or performing other religious ceremonies prescribed for Kshatriyas.[45] Among the Kayasthas marriage between persons within five degrees of affinity on the female side and seven degrees on the male side is prohibited. There is no marriage among the sapindas of the person or of his mother or grandmother. Brahma form of marriage is followed by them. Neither widow marriage,[46] nor divorce are recognised, and either a girl or married woman is expelled from the caste if detected in a liaison. They venerate the ordinary Hindu deities. They worship Chitragupta, their divine ancestor, at weddings and at the Holi and Diwali festivals. Twice a year they venerate the pen and the ink. The dead are burnt, and the proper offerings are made on the anniversaries, according to the prescribed Hindu ritual.[47] From such similarity it seems that there is no difference between the Kayasthas and the Kshatriyas.

23. *Reasons for the proposition that the Kayasthas are Kshatriyas in a nut shell.*—It has been already pointed out that the Kayasthas are referred to in the Puranas and the Smritis, where they enjoy a higher position of writers and accountants. Traditions are not wanting among the Kayasthas who won distinctions as warriors and leaders of Military Bands. It has also been proved from the inscriptions, which date that to the year 738 A. D., that the Kayasthas were either warriors or writers. The offices of writers were generally held by Niyogi Brahmans in the Andhra Desh.[48] If the Kayasthas would have been considered as Shoodras in those ancient days, it would not have been possible for them to do the work which was meant for the Brahmans or other higher castes. It has been noticed that they perform all the *sanskars* prescribed by the shastras. The position of the Kayasthas in the modern times speaks for itself and it is in the interest of justice and fair play that they should be considered as Kshatriyas for—

"Honour to him whom honour due".

43. Russell's Tribes and Castes of the Central Provinces (1916) Vol. 3, p. 413.
44. Yajnawalkya Smriti, Acharadhayaya, shloka 10.
45. Sarwadhikari's Law of Inheritance (1922) Edn. 2, p. 831.
46. Census of India (1931) Vol. 12 (Central Provinces and Berar), p. 353.
47. Russell's Tribes and Castes of the Central Provinces (1916) Vol. 3 p. 404 (416 to 422).
48. Bhattacharya's Hindu Castes and Sects (1896) p. 192.

EXTRACTS FROM CONTEMPORARIES.

Separation of Functions.

It was supposed that the old question of the separation of the Judiciary from the Executive in India had receded, at least temporarily, into the background on the adoption of India's new Constitution. Many and influential were those who maintained that such a separation was a reform or change of paramount importance; and few were those who denied the desirability in principle of such separation. It was said, however, by those who defended the existing order, that in the imperfect conditions of an imperfect world, and in those of India in particular, the separation was impossible in practice; and now, faced with the responsibilities of Government, it would appear that some who strongly advocate the principle and practice of separation are not certain that the time is yet ripe for reform.

The Congress Premier of Madras, for example, declared quite recently that the separation would endanger political advance. If, he said, in effect, the Judiciary were made independent of administrative control, the gains of provincial autonomy would be lost; and not long ago, in the

Bihar Assembly, it was said on behalf of the Government that while a resolution in favour of separation was acceptable, there were two serious difficulties : (1) finance; and (2) the consequential changes which would be necessary in the codes of procedure.

Theory and Practice. — It does not appear however that the rank-and-file (or back-bench) members of the Congress Party are yet prepared to leave the question in abeyance. In the United Provinces a resolution was adopted urging that a scheme be formulated for the separation of the Executive from the Judiciary. When the question was raised 10 days earlier in the Assembly, the Hon. Dr. K. N. Katju expressed the view that the need was not urgent, and suggested that the advent of the Congress Ministry made it a matter of less importance than formerly. Why it should become less important when those who advocated it came into power is a question which any seasoned politician will have no difficulty in answering.

It is more than 50 years since the Indian National Congress passed a resolution demanding the separation of the executive and judicial functions in India.

The answer to the question why the principle should not be universally adopted is apparent, that it is too expensive and is, in practice, impossible. In populous and wealthy areas it is comparatively easy and has been adopted, more or less. It is otherwise in the poorer areas. In Pitcairn Island or Tristan (to take extreme examples away from India). Mr. Christian and Rev. Mr. Wilde perform (I am told) judicial, executive and legislative functions, because there is no one else to perform them. All they can do is to keep, each in his own mind and person, the legislative, executive and judicial functions as separate and independent as possible. — *The Law Journal.*

Obiter Dicta on Bicycles.

A County Court Judge awarding compensation to a boy for an injury to his leg got on a seasaw, is said to have advised the father to buy him a bicycle "when he gets older". A High Court Judge, making an award to a boy who had suffered the shock of seeing his mother killed while bicycling, is reported to have said he hoped the boy would not buy a bicycle.

Will the lesser Courts consider themselves bound by the pronouncement in the High Court and give no more advice on locomotion for the young, or will it be considered that both the judicial observations are obiter of equal value ?

The truth is that bicycles are good for some people and bad for others. They can be used sensibly and carefully, or foolishly and carelessly. A bicycle can be a necessity or a pleasure, or can be merely a fad and a danger. Every potential purchaser of unstable equilibrium on the roads must judge for himself whether his outlay is wise or not, and it is to be supposed that he or she will not be much affected by judicial pronouncement.—*Justice of the Peace.*

REVIEW

The Madras Agriculturists' Relief Act (4 of 1938) by MORUSUPALLI HANUMANTHA RAO, M.L., and MAZUMDAR RANGA RAO, B.L., Vakils, Guntur. Published by the authors themselves. Pages 82. Price As. 8.

The authors of this small book have incorporated in it not only the main Act but also the Statement of Objects and Reasons, Rules framed by the Government, Select Committee's Report and a useful Introduction. We recommend this book to the members of the Bench and Bar, particularly of the Madras Presidency.

MR. K. S. KRISHNASWAMI IYENGAR

NEW JUDGE OF THE MADRAS HIGH COURT

MR. K. S. KRISHNASWAMI IYENGAR was born in 1884 and was enrolled as a High Court Vakil, Madras, in 1909 after his apprenticeship under the late Mr. R. Satagopachariar, a leader of the Bar and an outstanding personality in his days. He was later associated with the late Mr. T. Narasimha Iyengar, another distinguished lawyer of learning and ability. He was also working with Mr. Nugent Grant on the Original

Side. In 1917, he was selected as a District Munsif in which capacity he acted for some time and then gave it up and reverted to the Bar—a decision which has borne him rich fruits now. He very soon built up a lucrative practice both on the Appellate and the Original Sides of the High Court and rose to the top of the profession which position he has been occupying for a long time. He acted as the Government Pleader, Madras, for some time in 1933 and in 1935 in the vacancy caused by the appointment of Mr. P. Venkataramana Rao as a Judge of the High Court, Madras, he was appointed as permanent Government Pleader, Madras.

Mr. Krishnaswami Iyengar is learned and industrious. He has delivered a series of special lectures on "Contracts" in the Law College, Madras, and has assisted the late Sir V. M. Coutts-Trotter in editing Mayne's "Hindu Law". He is a member of the Law Reporting Council, Madras, and also a member of the Madras Bar Council.

Mr. Krishnaswami Iyengar is of simple habits and of religious and orthodox disposition. His vast experience of men and things and of human nature gained as a result of his extensive and varied practice at the Bar is sure to stand him in good stead as a Judge.

Mr. Krishnaswami Iyengar's appointment as a Judge of the Madras High Court is to take effect from 18th July 1938.

May God bless Mr. Krishnaswami Iyengar with long life, health and happiness.

FAIRER INCIDENCE OF TAXATION

Providing Against Evasion

RS. 1 CRORE AS ADDITIONAL REVENUE

"Our intention or our desire is to make the incidence of taxation fairer as between class and class, to relieve the lower middle classes and to ask the rich to pay more.

"Apart from the provision of money for the provinces, there are other reasons which make this Bill desirable in itself, and of these I might mention the necessity for making the income-tax machine at once more efficient and more equitable. There must be in future no suggestion that the administration is harsh to the small tax-payers and far too lenient to the rich."

With these words, Sir James Grigg, Finance Member, Government of India, moved reference to a Select Committee of the Bill further to amend the Indian Income-Tax Act, 1922, introduced by him in the Session of the Indian Legislative Assembly, just concluded.

The Bill is a comprehensive measure, consisting of 75 clauses, covering the whole field of taxation on income, except the rates of tax which are left to be dealt with in the annual Finance Bill.

An immediate increase of Rs. 1 crore in revenue is anticipated in the first year of operation after the Bill is brought into force.

Explaining the provisions of the Bill, Sir James said :

"I will deal first with the question of the foreign income of residents.

The Committee of Inquiry* recommended the assessment of all foreign income of residents in British India on the basis of the amount actually arising and their recommendation made no distinction between persons domiciled in British India and those not so domiciled.

Taxing Foreign Income

Where the assessee is resident in British India, the assessment will, to the extent that the income is from business controlled in British India be on the full income arising whether remitted to India or not.

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* Consisting of K. B. J. V. Vachha, C.I.E., Commissioner of Income-tax, and Messrs. C. W. Ayers and S. P. Chambers of the Board of Inland Revenue in the United Kingdom.

The Committee were appointed in October, 1935, to make an investigation of the Indian Income-tax system in all its aspects and to report upon both the incidence of the tax and the efficiency of its administration.

and to the extent that the income is from other sources the assessment will be on the basis of the amount remitted to British India. In the case of persons who are also domiciled in India the basis will be, of course, the amount of the whole income arising.

What is now proposed follows very closely the system in force in the United Kingdom, the difference being that the income of a domiciled resident from sources other than a business controlled in British India or from securities, stocks, shares or rents is to be assessed in British India on the amount of income arising, whereas in the United Kingdom the basis of this residue of income is the amount actually brought into the country. Our proposals therefore are somewhat stiffer than the United Kingdom law and they have been framed in the light of the difficulties which are known to exist there.

Catching the Dodger

I come to the provisions in the Bill which I regard as the most important, namely those which relate to the legal avoidance of tax.

These provisions are designed to prevent persons who are liable to tax and more particularly the very wealthy tax-payers from reducing their liability by tax dodging devices under which the law is evaded but not broken.

A good illustration of what we are out to stop is afforded by the method employed in a recent case in which super-tax amounting to Rs. 2½ crores was lost to the Exchequer. Several companies which were substantially owned by one family capitalized their accumulations of profits and issued to the shareholders debentures which were redeemable at three months' notice and were in fact redeemed about 12 months after they were issued and the shareholders thus received cash in redemption of debentures instead of receiving the same cash as dividends.

The remedy which we are providing for this is to define "dividend" so as to cover all profits distributed by a company, whatever form the distribution takes.

A simpler and older device for the avoidance of super-tax is by a company not distributing its profits at all.

Section 23A—A Dead Letter

Section 23A of the existing Income-Tax Act has proved practically a dead letter owing to the almost unworkable provisions which require the Income-tax Officer to determine the reasonable needs, existing and contingent, of a company. In place of the present provisions, we are substituting a simple rule that where less than 60 per cent. of the company's assessable income has been distributed, the whole of the profits shall be deemed to have been distributed and super-tax will therefore be payable by the shareholders.

This rule also is to operate if less than 100 per cent. of the profits have been distributed where the accumulated undistributed profits of past years exceed the paid-up capital of the company. As with the existing Section 23A, the new provision does not apply to companies in which the public are substantially interested. In other words, it applies to the private company which is virtually controlled by one or two persons.

"The Very Wealthy"

Another device of legal avoidance which is open only to the very wealthy is to float a company abroad, to transfer investments to it and to receive moneys from it in the form of loans which are not repayable.

As the company does not pay dividends no super-tax can be levied upon the principal shareholder who of course being the virtual proprietor has complete control of the company. Further the company is non-resident and therefore it cannot be dealt with under the non-distribution section and as the loans are not income, no super-tax can be charged even though the assessee may be receiving in this form exactly the same amount of money as he did when such receipts were in the form of dividends and were taxed accordingly.

Our counter to this is to treat the income of the company as the income of the person who would have been entitled to it, if these artificial transactions had not been entered into.

Although the remedy sounds simple, a complicated form of words is necessary in order to ensure that as far as is humanly possible no loopholes are left unstopped but at the same time to leave outside the net genuine transfers which have nothing to do with tax-dodging.

Finally, there is the more widespread practice of nominally transferring income, or assets from which income is derived, to a person who is not liable to income-tax, or

liable at a low rate, and this is to be checked by deeming the income to be the income of the transferor except in genuine cases where the assets are irrevocably transferred and the income goes to somebody other than the wife or minor child.

I do not pretend to have described the provisions of the Bill at all fully. I am only at this stage directing attention to its main features.

There is the provision for separating the appellate and inspecting functions of the Assistant Commissioners of Income-tax,—a change which has been very widely advocated for some years past. There is the provision for enlarging the scope of cases which are appealable, and there are the enhancement of penalties and the provision for a longer time in which to keep assessments and claims for refunds open.

What The Provinces Gain

On the assumption that the scale recommended in the Report of the Committee of Inquiry is adopted, I am confident that we shall get at least a crore of rupees from the legal changes alone; that is, entirely apart from administration, and I am pretty certain that that extra crore will accrue almost immediately, and that in time we should hope to get as much again, as the machinery of the anti-tax-dodging clauses becomes effective.

So far as I can see at present, the effect of this extra crore will be that until the year 1942-43 virtually the whole of it will go to the Provinces.

After that, the position is very complicated arithmetically, owing to the fact that the Neimeyer Award* was given five years for it to become fully operative. But the ultimate position will be that the Provinces will get one-half of this extra money but that their share of the increase will only decrease to one-half at the end of the second five years of the Award, and that in the meantime their share of the main corpus will be gradually increasing.

Perhaps it will be clearer if I try to put it into figures. They are for the time being purely illustrative. Let us assume for the purpose of this Bill that the Provinces will be getting for the first five-year period two crores a year from the existing yield of income-tax, and that the present Bill adds one crore to the total yield. Up to and including the year 1941-42 the Provinces will get three crores instead of two and in the succeeding five years they will work up from three to seven instead of working up from two crores to six and a half.

In other words during the first three years the Provinces will get one crore a year extra, for the next five years after that they will get on an average Rs. 70 lakhs a year extra, and thereafter Rs. 50 lakhs a year extra.

This is from the Bill alone, and is apart from improved administration and apart from any possibility of the normally expanding yield of the income-tax.

I wish to stress this point of the immediate and ultimate destination of the increase of revenue,—because it is perhaps the main reason to be urged in support of the Bill, that it will help the Provincial Governments in their work of reconstruction.

Critics Answered

This is a convenient point at which I might digress in order to deal with the recent speech of the President of the Federation of Indian Chambers of Commerce and Industry, the Honourable Sir Rahimtoola Chinoy. He said, firstly, that the Bill will hinder the development of Indian industries, and, secondly—and on the second one I wish to lay particular stress —that much larger sums could be got for the Provinces in much better ways even through the channel of the income-tax.

To take the first point, so long as income-tax presses more heavily upon the income of the tax-payer than upon his foreign income, there is a distinct discouragement of investment here, and the law is virtually subsidizing the export of capital.

The proposal for the taxation of the foreign income of persons resident and domiciled in India upon the full amount arising, instead of on that brought into British India, is a proposal which quite clearly will encourage the investment of money in India rather than abroad. Incidentally, this argument of Sir Rahimtoola Chinoy is the exact opposite to the argument which I have heard advanced viz. that this Bill is designed to injure the expansion of Indian enterprise abroad. Well, in so far as that enterprise does not

*The Award given by Sir Otto Neimeyer, who was appointed by His Majesty's Government to make recommendations, after reviewing the present and prospective budgetary provisions of the Government of India, on financial adjustments between the Government of India and the Provincial Governments.

contribute to the upkeep of India, why not? Really, you cannot have it both ways in this matter; you cannot simultaneously urge that we are stifling home investment and stifling enterprise abroad, that is unless the real contention is that no business man should ever pay any income-tax at all! That is the only way in which you can resolve that dilemma.

Abolishing Section 60

The second point in Sir Rahimtoola Chinoy's speech to which I have been referring is to the effect that by abolishing the notifications under Section 60, also double income-tax relief for companies registered outside India, a further three crores of revenue could be obtained.

Of course to start with, that three crores is a ridiculous estimate. The notifications to which the speech refers are those relating to pensions paid abroad and to leave pay and allowances paid abroad. The total amount of tax lost by the exemption of pensions paid abroad including those which are protected by the Government of India Act is of the order of some ten lakhs a year. The exemption of leave salaries and allowances paid abroad costs about 16 lakhs a year.

As regards double taxation relief, the total relief is probably about a crore and a half a year. I think the President of the Federation suggested that 99 per cent. of that went to British companies. That is again a ridiculously high proportion. Moreover, there are provisions in the Bill for tightening up the conditions on which double income-tax relief is to be given.

But apart from that, surely it would be a gross injustice to attempt to withdraw the relief from those companies and traders whose business has been established in India for many years on the assumption that the double income-tax relief would continue to be given. Such a course of action would lead to the export of capital from India. To me, it seems evident that the adoption of such a proposal would be a fresh addition to the obstacles to the trade and industry of the country and ultimately have grave repercussions upon the welfare of millions of India's agriculturists.

On the assumption that the scale recommended in the Income-tax Enquiry Report is ultimately put into operation in the next year's finance Bill, I would ask the House to realize that two-thirds in number of the tax-payers who now are subject to income-tax will under that scale pay less than they do at present, and the remaining one-third will pay more than they do at present; most of them a little more and some of them a great deal more. This is to me a staggering fact.

Steps That Led To The Bill

Perhaps I may leave for a moment the merits of the Bill and come to some of the steps which have led up to it. First of all we had a Committee of Inquiry, a committee which travelled round India for six months and then spent a further six months drafting their recommendations.

The Committee issued their report in January 1937 and on the report opinions have been obtained from all the notable commercial bodies in India. There are very nearly 500 closely printed pages of them.

Some 48 recommendations other than those already dealt with or to which I have already referred have been embodied in the Bill without alterations. Nine more have been embodied in the Bill subject to modification, but in only one of these is the modification appreciable and in all the cases the modified provision is less drastic than the original proposal.

In arriving at all of these modifications we have had before us 500 pages of opinions. Four proposals have been left over for further consideration, one of these being the inclusion of agricultural income for the purpose of determining the rate of tax on non-agricultural income.

Finally, six recommendations, and six only, have been rejected outright. In other words, the Bill is in essence the Report and the Report has been before the country for over a year, and I have laid before the Assembly 500 closely printed pages of opinions by commercial bodies on this Report.

What The Bill Does Not Contain

Explaining what the Bill did not contain, Sir James Grigg said :

A large number of the recommendations of the Committee of Inquiry do not involve legislation and these are in the main being put into operation by administrative action. There is one which is not yet operative, which I must mention specifically.

Honourable Members will find no specific mention in the Bill of the question of taxation of leave pay and salaries drawn abroad. These are at present exempt by reason of a notification which has been issued under section 60 of the present Act.

I wish to say here and now that it is the intention of the Government of India to cancel the notification exempting leave pay and salaries paid abroad, provided that this Bill is passed in substantially its present form, and that that cancellation will take effect as from the date from which the Bill becomes operative.

I may add perhaps that the Bill does amend the existing Act so as to make it clear that if the exemption goes the income to which it relates can be made effectively liable to tax.

There is another important recommendation of the Committee of Inquiry which Honourable Members will not find in the Bill, the position in regard to which should be explained, and that is the scale of rates of tax.

This, of course, involved legislation and Honourable Members will find here and there in the Bill clauses which proceed on the assumption that the 'slab' system* will be introduced, but the scale of actual rates of tax applicable to different slabs of income is left over to be dealt with in the annual Finance Bill.

Agricultural Incomes

Another thing which I might mention here, which Honourable Members will not find in the Bill, is the question of taking into account agricultural income for purposes of assessing the rate of tax on non-agricultural income.

The reasons for its non-inclusion in the Bill and its postponement till a more convenient season are as follows:—

Some of the provinces have already introduced legislation taxing agricultural income. Some of them have schemes for such taxation in contemplation.

Those which have come to my notice are definitely on different lines from our income-tax and therefore I am not sure that the situation is sufficiently clear to enable us to embody in our income-tax law a provision taking into account agricultural income for the purposes of our income-tax.

The ultimate ideal is one uniform and unified income-tax covering all income, the total income being assessed and collected in collaboration and distributed in accordance with definitely clear and clearly laid down principles, but it is quite obvious from the opinions of Provincial Governments on this subject and from the steps which have been taken by some of them that we are nowhere near this ideal and we have no alternative but to postpone this question until the situation becomes clearer.

The motion to refer the Bill to a Select Committee was adopted after a debate in which all parties in the House took part.

— *Indian Information Series, May 15, 1938.*

* Under the "slab" system progressive rates are applied to successive slices of income, while under the "step" system tax is charged at the same rate on the whole income.

Effect of raising of attachment in a suit under O. 21, R. 63, Civil P. C.

By R. HANUMANTHA RAO, *Vizianagaram.*

Mr. K. S. Gambhir has written an article under the above caption, which was published in this Journal.[1] He considers therein the question whether the suit of a defeated claimant, instituted under O. 21, R. 63, Civil P. C. and coming up for trial after the raising of the attachment, has to be dismissed as not maintainable, there having been by that time no subsisting attachment, or decided on merits. He gives it as his "considered opinion" that the suit is maintainable and has to be decided on the merits.

With this view, of course, nobody had ever disputed or will ever dispute. In fact, any owner of property, can at any time, under the general law, institute a suit for a declaration of his title against anybody, disputing or interested in disputing his title, subject of course to the provisions of Art. 120, Lim. Act. Therefore any suit for declaration of one's title to a property has always to be decided on merits. But in the

1. *See* A I R 1938 Journal 5.

case of defeated claimants in execution proceedings, the period for filing such a suit is limited to one year from the date of the adverse order on the claim petition by Art. 11, Lim. Act.

Therefore the question naturally resolves itself into whether this limitation binds the defeated claimant in the exercise of his otherwise practically unrestricted right to declaratory relief in spite of the attachment being raised.

Mr. Gambhir evidently labours under certain misconceptions. First of all, he gives a very strange and unwarranted interpretation to a decision of Wallace J. reported in A I R 1927 Mad 893.[2] As a result of such an interpretation, the learned writer sets about answering the question, whether the suit of a defeated claimant, instituted under O. 21, R. 63, Civil P. C. on the date of the raising of the attachment, due either to default of prosecution of the decree-holder's execution application in which the attachment was made, or to the decree being fully satisfied, can be dismissed technically as not maintainable, there having been no subsisting attachment, and hence no cause of action, and consequently the suit abating. Mr. Gambhir fancies that in the above decision Wallace J. decided that when the attachment is raised the cause of action falls to the ground and hence the suit abates.

That was not at all what was decided in that case.[2] The plaintiff instituted a suit for declaration of his title to certain property and to eject the defendants therefrom. That property was attached in execution of a decree against the defendants, and the plaintiff's father preferred a claim under O. 21, R. 58, Civil P. C. which was dismissed. Thereupon the plaintiff's father instituted a suit under O. 21, R. 63, Civil P. C. which was dismissed for default, due to the suit having been compromised. Hence the adverse order against the plaintiff's father not having been set aside by a suit filed within one year, the learned Judge had only to decide whether the plaintiff's suit was or was not barred by the one year rule of limitation. Thus, what the learned Judge had to decide was a question of limitation, and not the maintainability of the suit for want of a cause of action, or rather whether, when the attachment was raised within one year of the adverse order, the defeated claimant is still under the obligation to file the suit to get the order cancelled. The learned Judge says :

> Both Courts have overlooked the important fact that when the attachment was raised, the cause of action for the claim petition or for any suit founded upon an order on that petition thereby fell to the ground. It was not necessary for the plaintiff's father to proceed with the suit after the attachment had ceased. The short period of limitation of one year from the date of an order on a claim petition is fixed in order that the claims against attachments may be disposed of promptly. But, when there is no attachment subsisting, that reason vanished.

Evidently, what was decided was that as the attachment ceased, no suit need be filed to cancel the adverse claim order, and if filed, the one year rule of limitation has no application. The learned Judge used the phrase "cause of action" apparently not in its technical sense, but in the sense of "necessity for filing the suit" as the cause of action for the suit is not the attachment, but the making of the adverse order on the claim petition. So the learned Judge held that the suit is maintainable, quite the contrary to that misapprehended by Mr. Gambhir.

The propositions of law, that a defeated claimant is under no obligation whatsoever to file a suit if the attachment is raised within one year from the adverse order, that when the property is re-attached, the same question can be agitated again, either by a fresh claim petition, or by a suit within one year from the subsequent attachment, and that when there is no such subsequent attachment, the one year rule of limitation does not govern the suit of the defeated claimant, and that, if he so chooses, can maintain the suit under the general law, are too well-settled by a consensus of judicial opinion of all the High Courts to require a detailed discussion. Reference may be made to the decisions in A I R 1924 Cal 744,[3] A I R 1934 All 267[4] and A I R 1931 Lah 74[5] which confirm the soundness of the Madras view expressed in A I R 1927 Mad 893.[2]

Mr. Gambhir again seems to labour under the notion that the order on the claim petition is conclusive between the

2. Hanumiah v. Hanumiah, (1927) 14 A I R Mad 893=104 I C 424.

3. Najimunnessa v. Nacharaddin, (1924) 11 A I R Cal 744=83 I C 233=51 Cal 548=39 C L J 418.

4. Habibullah v. Mahmood, (1934) 21 A I R All 267=148 I C 676=56 All 537=1934 A L J 19 (F B).

5. Chet Singh v. Gujar Singh, (1931) 18 A I R Lah 74=131 I C 225.

parties unless set aside in the suit. No doubt the Rule, R. 63 in O. 21, Civil P. C., says that "subject to the result of such suit, if any, the order shall be conclusive". These words suggest the above view, that it is conclusive between the parties, but that is not a proper interpretation, as it leads to the startling result of compelling a defeated claimant to file a suit even though there is absolutely no necessity. The proper construction would certainly be that it is conclusive not between the parties generally, but conclusive only so far as that particular execution application is concerned, i.e. only so far as the particular execution proceeding, in which the attachment was effected, is concerned. The language of Article 182 of Lim. Act and O. 21, R. 57, Civil P. C. supports the view that a subsequent execution application is a different proceeding. Under the latter provision, an execution proceeding ending by default of decree-holder ends the attachment also, and the claim order relates only to an objection to that particular attachment, and is conclusive only as regards it. Therefore it is not conclusive between the parties in a different execution proceeding of the same decree. This view is fortified by the decisions already referred to.

The argument of the learned writer based on "commonsense" is rather difficult to follow. He says that :

> A clever decree-holder would attach the property of a person other than his judgment-debtor, and on that person's objections being rejected, that person being forced to file a suit under O. 21, R. 63, his worry and expense can be set at naught by a simple filing of the execution petition, and throwing grave doubts on the ownership of the property.

Suffice it to say that no decree-holder would be foolish enough to wilfully attach a property, knowing perfectly well that it belongs to a third person, and thus to court continued litigation, the result of which is most likely to be adverse to them.

To conclude, the effect of the raising of the attachment on a suit for declaration of the defeated claimant's right is to free it completely from the bar of one year's limitation, relegating the parties to the position existing before the attachment, and thus leaving the defeated claimant to his entire choice, whether to file a suit or not.

A Note on the Muslim Dissolution of Marriage Bill, 1938.

[Introduced in the Central Legislative Assembly on 3rd February 1938 by Mr. Muhammad Ahmad Kazmi.]

By *Abdul Hussain, M.A., M.L., Advocate, High Court & Federal Court, Calcutta.*

I have my whole-hearted support to the Bill, although the Muslim law is too liberal to demand such a piece of legislation. Its justification lies in the narrow interpretation and misapplication of the provisions of Muslim law. If the Quranic provision is applied in the spirit in which Hazrat Muhammad applied to the case of Jamela,[1] this Bill would not have been called for at all. The provision runs thus :

> Then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so do not exceed them and whoever exceeds the limits of Allah, these it is that are the unjust : Translation of Part II, Chapter II : 229 see Muhammad Ali p. 106 [Holy Quran].

This is Rule 6 with regard to divorce found in the Quran. It gives the wife the same right to claim divorce as it gives the husband to pronounce it. If incompatibility or unsuitableness of the match is recognized as a good ground of divorce, she must have right to claim divorce on grounds of cruelty and ill-treatment. If the Bill contemplates to codify this liberal provision which puts husband and wife on the same footing, it will go a great way in removing the differences between them and in establishing peace and harmony in the family. Only incompatibility owing to differences between the husband and wife caused by various factors, social, moral, physical, economic and environmental should be the sole ground equally entitling the wife as well as the husband to dissolution of marriage tie. This is to my mind the gist of the Quranic Text and the tradition quoted above.

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1. She was the wife of Sabit Bin Qais. She was dissatisfied with the marriage. There was not even a quarrel as she stated in her complaint to the Holy Prophet : "I do not find fault with him on account of his morals, i. e. his treatment or his religion." She only hated him. Holy Prophet had her divorced on condition that she would give up her claim to dower. Hence husband was not at fault, yet divorce was allowed. In case of husband's fault therefore she will be *a fortiori* entitled to divorce.

Now keeping this provision in view, I venture to make the following suggestions viz:

(1). Cl. 2 should be deleted. There is no need of distinguishing between Maliki and Hanafi law. This is controversial. If the Quranic provisions are codified, no particular school need be given any specific preference.

(2). Cl. 3 should be more illustrative and wide to incorporate various other specific grounds which I shall add herein below.

(3). Cl. 4 should be deleted on the ground on which I propose to delete Cl. 2.

(4). Cl. 5 should be amended thus :

The conversion of a married Muslim woman to a faith other than Islam shall be a good ground of dissolution of the marriage tie after her muslim husband has refused to change his faith on her having invited him by a notice in writing to accept her new faith.

(5) Clause 6 should be altogether deleted. It will create complications both administrative and financial which will prove oppressive both to the state as well as to the parties. If the law is clear any Judge trained on modern lines will be able to administer it.

This clause may be substituted by the following clause :

6. (a) All suits for dissolution of marriage or judicial separation or other reliefs by the wife shall be instituted in the Court of the District Judge in his matrimonial jurisdiction on payment of a fixed Court-fee of "12 annas only" and all such suits shall be disposed of within six months from the date of institution.

(b) The order passed in all such suits shall be treated as a decree from which an appeal shall lie direct to the High Court to which the Court of the District Judge is subordinate on payment of a fixed Court-fee of Rs. 2 within 30 days from the date of the order.

(c) All such appeals shall be treated as miscellaneous appeals and shall be disposed of within the maximum period of six months reckoned from the date of the order passed by the District Judge.

(d) No second appeal shall lie from the order passed by the High Court in appeal.

These provisions are more necessary than anything else, if real remedy is desired for the aggrieved women. In matrimonial suits, women plaintiffs are often made victims of litigations and are harassed from Court to Court. According to Full Bench decision reported in 41 C W N 314,[1] the suits for dissolution of marriage are to be instituted in Courts of ordinary civil jurisdiction. The jurisdiction is determined according to valuation which means varying court-fees. Heavy court-fees often stand in the way of indigent and poor women seeking dissolution. So I propose to fix a specified court-fee of annas 12 for suits and Rs. 2 for appeals. The Court should be the District Judge who was once the Qazi. And there shall be only one appeal. Now there is a provision for second appeals also. So, unless the existing judicial procedure is changed, the object of the Bill will be frustrated. No suit is likely to terminate in less than 3 years on the most conservative estimate. I have proposed the provisions to effect speedy disposal of matrimonial suits and appeals in which Muslim women are parties.

Clause 3 may be substituted by the following clause :

3. A Muslim married woman shall be entitled to a decree for dissolution of marriage in suits against or by a husband on any of the following grounds, viz :

(a) that the husband has deserted or left the wife without having made any provision for her maintenance, 'subsistence', raiment or habitation;

(b) that the husband has been imprisoned for a longer period than 3 years and there is no provision for her maintenance and she cannot live under the roof of her husband without endangering purity of her moral character and honour;

(c) that the husband, by his conduct such as neglect, ill-treatment and indifference, has forced her to beg for her living;

(d) that the husband has allowed her to suffer starvation or want and ill-treatment by his own relations such as mother, sister, brother, father;

(e) that the husband has been missing for over two years from the conjugal domicile without having made any provision for her maintenance and comfort consistent with her social position;

(f) that the husband has persistently neglected or refused to visit her and fulfil his marital obligations;

(g) that the husband has forced her to labour at work of a kind which is considered degrading to a woman in her position;

(h) that the husband has more than one wife and does not treat them equitably or that there is disagreement between the wives;

(i) that the husband treats her habitually with cruelty or is in the habit of abusing or beating her or threatening her with bodily injuries ;

(j) that the husband persistently refuses to pay her prompt dower and spends his income on evil ways:

(k) that the wife having option of puberty has exercised it;

(l) that the father has married his minor daughter carelessly and negligently and the match has been unequal and detrimental to her peace and happiness;

(m) that the husband is impotent or is incapable physically or otherwise of fulfilling marital obligations;

(n) that the husband has falsely accused the wife of unchastity;

(o) For any other reason which may be sufficient and reasonable under Muslim law to justify dissolution of marriage.

1. Burhan Mirdha v. Mt. Khodeja Bibi, (1937) 24 A I R Cal 189=168 I C 639=I L R (1937) 2 Cal 79=41 C W N 314=65 C L J 21 (S B).

INCOME TAX ACT AMENDMENT
The Bill Explained

HARD TIMES FOR TAX-DODGERS

The main provisions in the Bill fall into four broad divisions :—

(i) proposals which increase revenue including those which deal with evasion (legal or illegal) of the existing provisions of the Act ;

(ii) proposals which liberalize the Act and, therefore, cause loss of revenue ;

(iii) proposals which improve the Act technically, and

(iv) proposals affecting internal administration.

Of the proposals coming under the first class, which seek to put a stop to evasion of the tax, mention may first be made of the new definition given to the expressions 'dividend' and 'income'.

To prevent the avoidance of super-tax which would otherwise be payable by the shareholders by the device of distributing the profits in the form of bonus shares, bonus debentures or some other form which, according to the law as it stands at present, are capital receipts and not income in the hands of shareholders, 'dividend' is defined in such a way that wherever the shareholders receive profits in any of such forms, it can be treated as income for tax purposes. The definition also covers the case where a company goes into liquidation and the accumulated profits are distributed by the liquidator to the former shareholders.

'Income' is then defined to include any such dividend and also to include distributions from unrecognized Provident Funds.

By another amendment, 'salaries' are made taxable when due, whether paid or not, and advances of salaries by way of loan or otherwise are made taxable, the object being to defeat evasion by postponing drawal of salary or by taking advances or loans against salary.

Income Payable Outside India

Again, in order to ensure that tax is collected on interest and salaries payable outside British India and on payments to unrecognized Provident Funds, it is provided that no allowances shall be made in respect of them to those who pay them unless tax has been deducted therefrom or arrangements have been made to deduct it therefrom. Thus the employer and the debtor will have a direct personal interest in seeing that tax is recovered from salaries and interest paid by them to non-residents.

Interest on a public loan issued before the 1st April 1938 is, however, excepted from the operation of this provision.

Settlement of income upon another person, or the transfer of assets, so that the income therefrom arises to such other person is a simple device not infrequently resorted to for avoidance of tax. An amendment designed to put a stop to this practice, provides that the income in such cases is to be treated as the income of the settlor or transferor, except where the transfer is irrevocable.

In the same way income from assets transferred to a person or association for the benefit of transferor's wife or minor children is made liable to tax.

Compulsory Returns

A major change is sought to be made in the law by an amendment prescribing compulsory returns of income. The issue by the Income-tax Officer of the notice, now compulsory, calling for a return of income is in consequence made optional. This change in the law follows the United Kingdom law and it is intended as in the United Kingdom that the Income-tax Officer should (as he now does) issue notice to each person whom he believes to have an assessable income. The object of the provision pre-

scribing compulsory returns is to enable the Income-tax authorities to deal with defaulters who conceal the fact that they have taxable income. It is not considered right that the onus of finding such person should be on the Income-tax authorities and this provision coupled with the penalty provision and the extension of the time for initiating assessments is designed to put the Income-tax authorities in a position to deal adequately with defaulters.

For the ordinary tax-payer who is on the Income-tax Officer's books and receives a notice every year there will not be any difference. The only persons affected will be those who have hitherto effectively concealed from the Income-tax Officer the fact that they have a taxable income.

Another change provides that in the case of a registered firm, the partners, and not the firm, are to be assessed and that partners of an unregistered firm may be assessed in the same way if they are avoiding tax by non-registration. A partner's share is to be his share of the previous year's profit and he may carry forward his share of loss. The firm is to be assessed on a non-resident partner's share.

Undistributed Profits

Taxation of undistributed profits of private companies had hitherto been almost impracticable mainly because the section of the law providing for such taxation imposes upon the Income-tax Officer the duty of determining whether the profits of the company are allowed to accumulate beyond its reasonable needs, existing and contingent, having regard to the maintenance and development of its business. A modification is accordingly proposed substituting a simple arithmetical criterion for the determination of the applicability of the section, to the circumstances of a company in any year.

An amendment provides that, except where owing to losses incurred in previous years or to smallness of profits, payment of dividend would be unreasonable, when less than 60 per cent. of the company's assessable income has been distributed, the whole of the profits shall be deemed to have been distributed and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessment.

This rule is also to operate if less than 100 per cent. of the profits have been distributed when the accumulated undistributed profits of past years exceed the paid-up capital of the company.

Subsidiary companies and companies in which the public are substantially interested are excluded from the operation of the section.

Assets Abroad

One of the methods of avoiding the payment of tax without breaking the law has been the transference of assets from which the income arose to a company which is resident outside British India and then to receive payments from that company in a form and in such circumstances that the amounts received from the company are never in fact repayable or repaid to it. The effect of these arrangements is that the real owner of the assets receives the income therefrom indirectly and in a capital form. These receipts cannot, as the law stands at present, be treated as income in the hands of the recipients, nor, since the company is a non-resident company, can be subjected to the provisions which deal with a company which, to enable its proprietor to avoid super-tax, fails to distribute its income.

To prevent the loss of tax through such devices, a new provision has been proposed, after the United Kingdom law on the point, the intended net effect of which is that wherever income which really belongs to a person liable to income-tax and super-tax becomes by means of an artificial set of transactions the income of somebody liable to pay less tax or no tax at all, such income can for tax purposes be treated as the income of the person to whom it really belongs.

Deducting Tax at Source

Considerable enlargement is proposed in the scope of the provisions for deduction of tax at source.

An amendment provides for deduction of super-tax at source from 'salaries', the deduction to be in conformity with the 'slab' system of rates.

In the case of non-residents, deduction is to be made at source from interest and other payments made to them, the deduction from 'salaries' to be at the maximum

rate for income-tax and to include super-tax.

When deduction at source is not practicable, the payments will be disallowed in the payer's assessment, as indicated before.

Provision is also made for recovery from the company as well as its principal officer of any tax not deducted at the source when required to do so.

Heavier Penalties

Enlargement is also proposed in the scope of the penalty provisions which are designed to give the Income-tax Department more effective means to deal with illegal evasion. Penalty is increased from the amount of the tax avoided to twice that amount ; it is to include super-tax as well as income-tax ; and it is to be imposable for failure to file the return or to submit accounts or to submit other evidence in respect of the return. To prevent hardship in the case of a person with no income liable to tax, the penalty is limited to Rs. 50 and in the case of the agent of a non-resident, the penalty for failure to file the return can only follow the issue of a specific notice calling for a return.

At the same time provision is made for enhancement of penalty by officers exercising appellate powers.

OTHER REVENUE INCREASING PROPOSALS

Foreign Incomes

In the other provisions which are likely to add to the revenue, there is one which enlarges the application of the Act so as to bring within its scope certain foreign incomes not at present taxed.

At present the Income-Tax Act applies to income which accrues or arises or is received in British India and, in addition, in the case of a resident, to income accruing or arising outside British India if received in or brought into British India. The Bill enlarges the scope of the Section by including :—

(i) the whole of foreign income of a person resident and domiciled in British India whether brought into British India or not ;

(ii) the whole foreign income from business, profession or vocation of a person resident but not domiciled in British India whether brought into British India or not. The other foreign income of such a person remains liable only if brought into British India.

These amendments follow provisions of the United Kingdom law except in respect of the foreign income of domiciled and resident persons other than income from business, securities, stocks, shares or rents. Such income in the United Kingdom is taxed on the remittance basis whereas the Bill proposes to tax it on the accruing or arising basis.

An important omission is the exemption hitherto allowed to income from agriculture in an Indian State.

Religious Trusts

Legal sanction is given to exemption from liability to tax hitherto allowed to income from business carried on by religious or charitable institutions, but the exemption is to be now confined to cases where the business activities are in themselves a primary purpose of the institution or the work in connection with the business is mainly carried on by the beneficiaries.

Further, such exemption shall not be given to income of a private religious trust which does not enure to the benefit of the public.

Allowance for Interest Restricted

Again, restriction is also proposed on allowance for interest on capital charge on property. Such allowance in future is to be confined only to interest on a charge to which the property was subject at the time of acquisition by the assessee and interest on capital borrowed for the purpose of acquiring, repairing, renewing or reconstructing the property.

Depreciation is to be treated on the same footing as any other expense of the business. Consequently as in the case of any other loss, the carry forward of depreciation is restricted to six years.

Profits of a trade, professional or similar association performing services for its members for remuneration are also made liable to tax.

Another amendment limits the exemption in respect of payments on account of life insurance premia and to Provident Funds, etc. to 1/6th of the total income or Rs. 6000 whichever is less. Further, the exemption shall be given at the average of the rates applicable to the total income or,

in other words, in conformity with the 'slab' system of rates.

Husband and Wife's Income

Husband and wife, it is proposed, are to be assessed separately at the rate applicable to the total income of both, but subject to an allowance up to Rs. 500 in case of income earned by the personal exertion of the wife.

By another amendment the rate applicable to the whole income is sought to be made applicable to the taxable income of non-residents, part of whose income is non-taxable foreign income and to assessees, part of whose income is exempted from taxation.

Again, in order to bring within the net of taxation all income arising in a primary sense from British Indian sources, provision has been made, in the case of non-residents, for the inclusion of the income accruing or arising from any asset or source in British India or through or from any money lent on interest and brought into British India in cash or in kind.

Double Income-tax Relief

Double income-tax relief, it is proposed, to restrict to half the Indian rate; the relief granted to the company is to be taken into account in calculating the refund admissible to the shareholder and any excess relief granted to the company over relief admissible to the shareholder may under the proposed arrangement be recovered from him.

At the same time the period for assessing income which has escaped income-tax is extended from one year to six years.

Liberalizing The Law

The first to be mentioned amongst the provisions by which it is proposed to liberalize the operation of the Income-tax Act is the allowance made—not now granted—for an annual charge, not being a capital charge, to which the assessable property was subject at the time of its acquisition by the assessee.

In the matter of depreciation more liberal conditions are proposed to be laid down for grant of obsolescence allowance. This allowance is now to be given in respect of any machinery or plant sold or discarded and is to be the excess of the written down value over the sale price or scrap value provided that this amount is written off in the books of the assessee. Any excess of the sale price or scrap value over the written down value is, however, to be treated as an assessable profit.

Carry Forward of Losses.

A major change which affects the whole scheme of the Act is the provision proposed for allowing carry forward of losses. The period of carry forward is to be six years, but to mitigate the effect on revenue of this concession losses of the first "previous" year after the commencement of the amending Act are to be carried forward for one year, losses of the next year for two years, and so on, until the full period of six years is reached.

Another provision which liberalizes the Act is the extension of the period for claiming refunds from one year to six years.

Administrative Changes

Amongst the proposals which will improve the Act technically, there is one which seeks to bring income from professions and vocations under the same head as income from business.

Provision is also made for assessment to be made on individual partners of firms or on individual members of association and for separate assessment on co-owners of property.

By another provision an allowance is proposed in respect of bad and doubtful debts which are written off, but at the same time no allowance is to be given for payments to partners.

There is a proposal to alter the basis upon which depreciation allowance is to be calculated from 'original cost' to the original cost less the sums previously allowed for depreciation. But such an allowance is to be restricted to the amount written off in the assessee's accounts. Depreciation allowance is also to be given for machinery, etc., partly used for the business and also for those let out on hire.

Dividend Payments

Dividend payments are proposed to be put on the same footing as interest on securities, and credit for the appropriate amount of tax on it will be given in the assessment.

In the case of unregistered firms and associations, the exemption is to be granted to the proportion of the firm's taxed profit

which the assessee is entitled to receive, instead of to the amount of the firm's profits proportionate to the assessee's share therein at the time of making the assessment as now allowed.

Provision is made for loss in a business, profession or vocation, to be carried forward and set off against the profit of the same business, profession or vocation and, in case of changes in the firms and of succession, for taxing the persons on their actual shares of the profits. But assessment on and recovery of tax from the successor will be permissible where the predecessor in interest cannot be found or where he will not or cannot pay the tax.

In another amendment power is proposed to be given to assess the beneficiaries direct. Thus an assessment can be made on a non-resident direct instead of on his resident agent. Further, the basis of assessment on the guardian, trustee, or agent is changed from assessment on what he receives to assessment on what he is entitled to receive on the beneficiaries' behalf. In addition, trustees are made assessable in respect of the trust income and provision is made for assessment, at the maximum rate of income which is not specifically the income of the beneficiary or where the individual shares in the income are indeterminate or unknown.

Helping the Assessee

Changes are also proposed to tone up administration generally. Thus, steps are proposed for the simplification of provisions regarding refunds and provision is made for appeal in cases of assessment resulting in loss, refusal of refund or full refund, and of assessment made where there has been failure to comply with requisitions from the Income-tax Officer.

Again, a time limit of six years is to be fixed for the completion of assessment and also for rectification of mistakes.

The minimum amount of interest payment which the payer is under legal obligation to report annually is reduced from Rs. 1000 to Rs. 200.

Lastly, for the purpose of improving internal administration, provision is made for dividing Assistant Commissioners of Income-tax into Appellate Assistant Commissioners and Inspecting Assistant Commissioners and to place the former under the control of the Central Board of Revenue, and the Income-tax Officer is given the right to be represented before the Appellate Assistant Commissioners in hearings of appeals against his orders.

— *Indian Information Series, May 15, 1938.*

The Hindu Women's Rights to Property Act, Act 18 of 1937.

By M. Rama Murti, M. A., B. L., Vakil, Vizagapatam.

I must first pray for an apology from my readers for venturing to write on this subject when already two learned articles, (see foot-notes 1 & 2) have been submitted on the same subject. The only excuse is that the subject admits of further discussion. It is not however proposed to touch any of the grounds covered by them, except in so far as the same may be necessary in the course of the discussion.

It is undoubtedly true that the Act confers a boon on Hindu widows. It is a boon not in the sense that valuable rights are conferred on them undeservedly but in the sense that there is a present recognition of these just rights which should have been done long ago. The present Act has alleviated widows from their awful and deplorable plight. It is equally true that there are some defects in this Act in that there is scope for controversy both with regard to the interpretation of some of the provisions and with regard to succession to the estate on the death of these widows with the inevitable consequence that there is bound to be inordinate wastage and unfruitful litigation.

The material portion of Section 3 reads thus :

Section 3 (1).—When a Hindu governed by the Dayabhaga School of Hindu law dies intestate his property and a Hindu governed by any other school of Hindu law or by Customary law dies intestate leaving separate property that separate property shall, subject to the provisions of sub-s. (3), devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son : provided that the widow of a pre-

1. Published in 46 L W 59 (Journal) by Mr. R. S. Srinivasa Charya, Advocate, Madras.
2. Published in (1937) 2 M L J 79 (Journal) by Mr. S. Venkataraman, Advocate, Madras.

deceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son's son :

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

Section 3 (2). — When a Hindu governed by any school of Hindu law other than the Dayabhaga School or by Customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had.

Section 3 (3). — Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

There is some controversy on the point whether the term "lineal descendants" in S. 3 (1) includes the female descendants. But there can be no doubt that the conclusion to be arrived at is that the female descendants are excluded from the scope of this Act. One strong reason is that the words of devolution of interest are significantly absent in S. 3 (1). When conferring new rights on daughters for the first time the Legislature would have worded S. 3 (1) as " . . . . shall . . . devolve on his widow and his daughters along with . . . . . ".

As mentioned already in the previous articles we have five more reasons namely:

(i) Female descendants are excluded by the widow even under the pre-existing law and if daughters were also included in that term the existing rights of widows are abridged—a result which is by no means apparent from the Act.

(ii) The term "lineal descendants" literally means not only descendants of the first degree but all descendants of a person irrespective of any question of degree or sex. If this were intended it could not be left to mere implication without express declaration.

(iii) S. 3 (2) clearly excludes all female descendants.

(iv) S. 3 (3) in terms refers to widows alone as the beneficiaries under S. 3.

(v) The English authorities mentioned by Mr. J. R. Gharpure.[3]

Now the provisions relating to daughter in the Bill as originally introduced by Dr. Deshmukh were expressly withdrawn even while the Bill was before the Select Committee of the Legislature. In the Report of the Select Committee, it is expressly stated "we have dealt only with the question of giving extended rights to widows". There is nothing in the wording of the Act to compel one to come to the conclusion that daughters also are included within the scope of the Act in spite of the manifest determined intention of the Legislature to so extend the rights of widows far from curtailing them and not to deal with the rights of daughters at all. On the other hand, the reference in particular terms in S. 3 (3) to Hindu widows alone as the beneficiaries under the provisions of S. 3 is conclusive on the point to show that the daughters are excluded from the scope of the Act.

Mr. K. B. Gajendragadkar[4] of Satara, while admitting that unintended and startling results would follow, still thinks that by reason of the use of the term "lineal descendants" the daughters of the propositus are included within the scope of this Act basing the same mainly on the decision of their Lordships in A I R 1930 P C 41.[5] This reasoning ignores the abovementioned cogent reasons. Again, it is important to note that the parties to that case were Mahomedans among whom daughters are also heirs along with sons. There their Lordships say that where the female heirs are not excluded "in direct terms or by necessary implication they also take" when female inheritance is possible along with the sons.

(To be continued.)

3. *See* (1937) A I R Journal page 159.
4. *See* (1937) A I R Journal page 159.
5. Safdar Ali v. Maksudali, (1930) 17 A I R P C 41=121 I C 229=26 N L R 119 (P C).

REVIEWS

The Payment of Wages Act (4 of 1936) by GOVINDLAL D. SHAH, B.A., LL.B., Shantiniketan Society, Ellis Bridge, Ahmedabad. The book can be also had from Messrs. N. M. Tripathi & Co., Princess Street, Bombay. Pages over 140: Price Rs. 1-14-0.

This book is the first commentary on the Payment of Wages Act, which though small is an important Act, being a new departure in social and labour legislation and is bound to have far reaching results for the bulk of the population in urban areas. It is a complete and exhaustive

hand-book, guide and reference book, with useful information added in the appendices. We trust the book is bound to be useful to those generous industrialists who want to treat the workers as only junior members of their industrial family and also to the lower subordinate staff in the industrial world. The price is comparatively moderate and get up quite nice.

The Law of Insurance in British India, by JASPAT ROY KAPOOR, M. A., LL.B. Published by Sri Ram Mehra & Co., Publishers Agra : Price Rs. 2-8-0. Pages 120.

With the passing of the recent Insurance Act which has consolidated the law relating to all sorts of insurance, the Insurance law in this country has materially changed; and this book published soon after the passing of the Act is bound to be welcomed by the insurance world and the legal profession.

Glaister's Medical Jurisprudence and Toxicology (Edn. 6), Edited by JOHN GLAISTER, M.D., D.Sc., BARRISTER-AT-LAW. The book can be had from Butterworth & Co. (India) Ltd. Publishers, P. O. Box. 251, Avenue House, Chowringhee Square, Calcutta : Price Rs. 17 (25s.). Pages over 750 with one hundred and seven Illustrations and eight plates.

The editor of this edition of the book has recast considerable portions of the subject-matter in order to include among others such important subjects as dermal prints, palmer prints, identification of maggots, identification of mutilated and dismembered remains with special reference to the famous Buck Ruxton case etc. These changes and additions are bound to enhance the utility of book as an authoritative text-book on this important and interesting branch of law. Further, welcome and useful changes have been made in the toxicological section and several new illustrations with two coloured plates showing poisonous berries and seeds have been substituted. The new index is exhaustive and well arranged. The book is bound to be very useful to medical practitioners and lawyers on the criminal side. The printing and get-up are good.

The Madras Agriculturists Relief Act (4 of 1938), by S. B. SOLASA, B.A., B.L., Vakil, Rajahmundry (East Godavari Dist.). The book can be had from the author himself. Pages over 170 : Price Re. 1-8-0.

The main Act is published with short notes based on case-law on the provisions of the corresponding enactments in the other provinces. Further, in the Appendix the author has given such corresponding enactments which can be usefully referred to in the interpretation of the provisions of this Act. The book is bound to be popular with the legal profession in the Madras Presidency.

The Land Acquisition Act (1 of 1894), edited by S. VENKATARAMAN, B.A., M.L., Advocate and Lecturer, Law College, Madras. Published by Madras Law Journal Office, Mylapore, Madras. Pages 378 : Price Rs. 5.

The Notes to the Sections explain in clear and lucid style the principles underlying the law relating to land acquisition, with reference to case law both English and Indian. The case-law has been brought down to 1938. Besides the Land Acquisition Act of 1894 as amended up-to-date, the text of the Land Acquisition (Mines) Act, the relevant provisions regarding compulsory acquisition in other enactments and the rules promulgated by the several Provincial Governments have also been given. The book will be found useful to land acquisition officers and the legal profession.

Acts relating to the Relief of Debtors (with special reference to the Madras Presidency) by P. R. AIYAR, B.A., B.L., Vakil. Published by the Madras Law Journal Office, Mylapore, Madras. Pages over 400 : Price Rs. 2.

In this volume the author has collected all the important enactments passed in the several Provinces for affording relief to debtors generally and agricultural debtors in particular with special reference to the Madras Presidency. Thus, in construing the provisions of an Act in one Province the provisions of the corresponding Act in a sister Province can be usefully referred to. The short notes of case-law given to these Acts will be found very useful. The book will be found to be of use to lawyers, Judges as well as a large body of the lay public.

SIR ERNEST HANDFORTH GOODMAN ROBERTS, KT.,

M.A., BARRISTER-AT-LAW

CHIEF JUSTICE OF THE RANGOON HIGH COURT

SIR ERNEST HANDFORTH GOODMAN ROBERTS, born April 20, 1890, son of Hugh Goodman Roberts, Solicitor, Mold, North Wales, and one time President, Chester and North Wales Law Society, educated in Malvern and Trinity College, Oxford, B.A.

1912, M.A. 1936. President, Oxford Union 1914. Served in His Majesty's Forces October 1914 to July 1919, Captain Royal Welch Fusiliers, attached Gen. Allenby's staff as Courts Martial Officer 1917 (Despatches). Judge Advocate, Military Courts in Egypt, 1919. Called to the Bar while serving in the Army (Inner Temple) May 1916.

Entered Chambers in Inner Temple October 1919, practised on Chester and North Wales circuit. Member of Parliament, Flintshire 1924-1929: various public appointments, e. g., Governor of University of Wales and National Museum. Appointed as Chief Justice at Rangoon February 26, 1936. Knight Bachelor, Birthday Honours 1936.

SIR JAMES ADDISON, KT., I. C. S.

OFFICIATING CHIEF JUSTICE OF THE LAHORE HIGH COURT

WE offer our congratulations to Sir James Addison on his appointment as officiating Chief Justice of the Lahore High Court for the second time with effect from 20th May 1938 during the absence on leave of Sir Douglas Young.

He was born on 13th November 1879 and had a very distinguished University career having passed his M.A. and B.SC. degrees of the Aberdeen University with distinction in Mathematics and Physics. He was a Simpson Prizeman in Mathematics, Greig Prizeman in Physics, David Bennet Gold Medalist and Fullarton Mathematical Scholar. He passed into the Indian Civil Service in 1902 and after acting in different

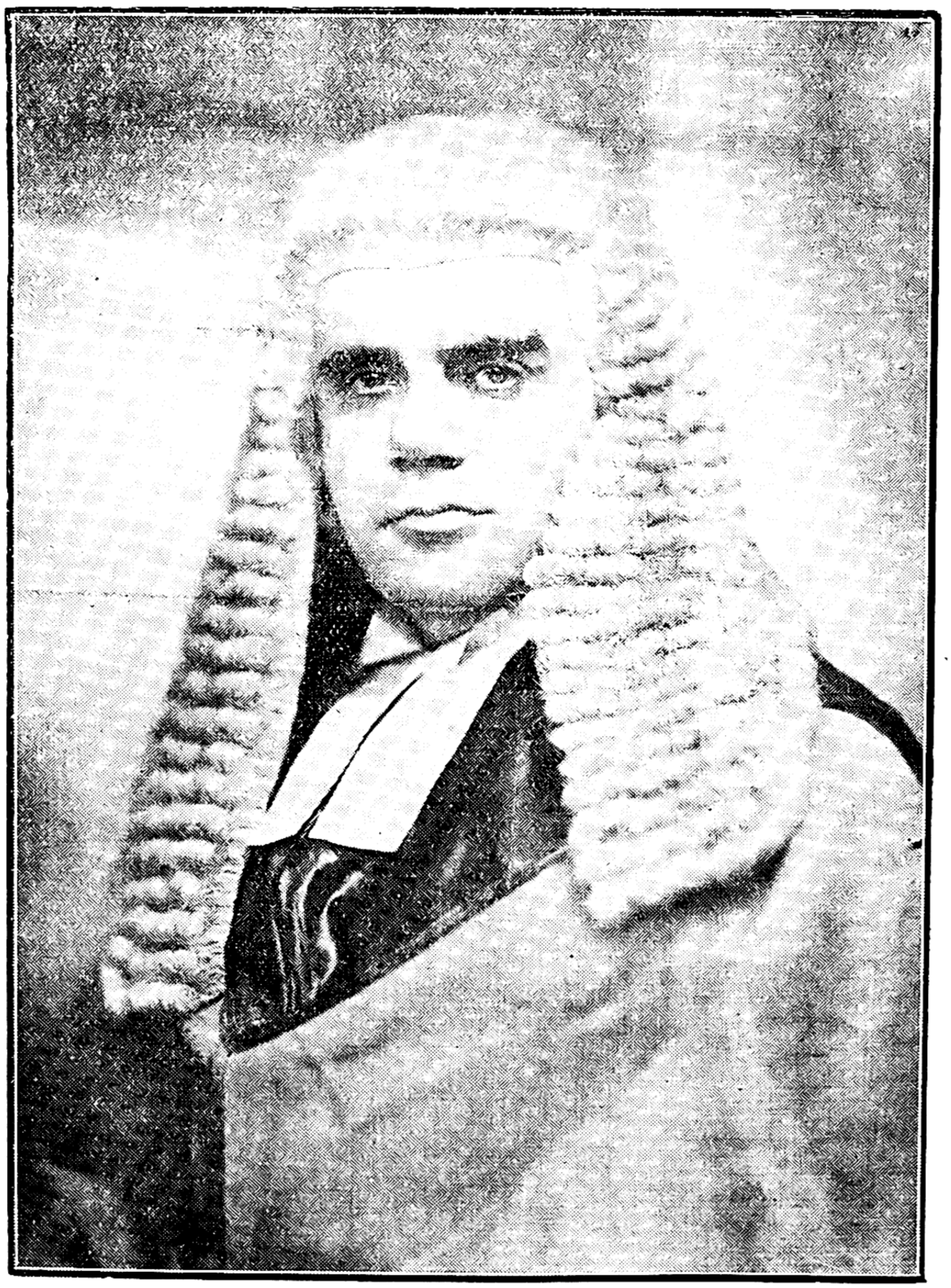
capacities was appointed District Judge, Delhi, in 1909; Special Land Acquisition Officer, New Delhi, in 1912; Judge Small Cause Court, Simla, in 1917; District and Sessions Judge, Rawalpindi, in 1920; and Additional Judge, High Court, Lahore, in 1925. He was appointed acting Chief Justice of the High Court, Lahore, in 1935.

His tremendous capacity for work in Court and out renders inevitable the prompt discovery of the crux of each case and disables counsel unprepared with their facts or law. As often as not, this learned Judge is found at the commencement of the argument to have a more precise and detailed knowledge of the essential points involved than the counsel who appears to explain them. His dry Scotch humour, vast experience, his amazing general knowledge (including specialities as far removed as Chemistry and higher Mathematics on the one hand and the habits and modes of life of the inhabitants of the Punjab on the other), inspire respect and admiration from all members of the Bar. In the case of this eminent Judge it is in fact not possible to select one particular branch of the law rather than another, for comment, all questions of law and fact being disposed of beyond all question or doubt within the minimum period of time. His rulings on that vast and nebulous mass of principle and conundrum, Punjab custom; his decisions relating to Sikh Gurdwaras and above all his Lordship's long series of interpretations of that intricate and complicated Statute, the Indian Income-tax Act, and commercial matters generally, are now a permanent and recognised guide to his colleagues and the Bar. Sir James Addison, however, rarely contents himself with laying down and following broad principles, the outstanding features of his judgments being his keen appreciation of the facts of the particular case before him and precise application of, and discrimination in applying, the law to those facts. Sir James was largely instrumental in enabling Sir Douglas Young to carry out his undertaking that appellants in the High Court at Lahore could rely upon a decision by that Court within six months of presenting their appeals; and such is the skill and rapidity with which Sir James gets down to the essentials of any case, that it is largely to that learned Judge that credit is due for the fact that arrears of appellate work in the High Court at Lahore (which used to extend back to 5 or 7 years) are now conspicuous by their absence.

MR. H. A. C. BLACKER, I. C. S.

JUDGE, HIGH COURT, LAHORE

MR. JUSTICE BLACKER who has recently been appointed a permanent Judge of the High Court is a brilliant member of the Indian Civil Service. Born on 15th August 1889, in London, he was educated at Charter House, Bedford Grammar School and Queens' College, Cambridge; passed into the Service in 1913 as Assistant Commissioner



and served successively at Sialkot, Lyallpur, Lahore, Gurdaspur and Sargodha. During the great war Mr. Blacker joined I. A. R. O. in July 1917 and was posted as Assistant Recruiting Officer at Ferozepur till Christmas 1918 with the rank of Captain. After the great war he served Government in various capacities as Assistant Commissioner,

S. D. O. and Deputy Commissioner. In November 1922, he was appointed Registrar of the High Court. In 1927, he was appointed District and Sessions Judge, Montgomery, and in 1930 became President of the Punjab Conspiracy Case Tribunal which lasted till December 1933. He was appointed Additional Judge of the High Court from October 1934 to July 1935 and acting Judge for June and July 1936, and again from April to July 1937 and November and December 1937. He was appointed a permanent Judge from 23rd December 1937.

His Lordship's reputation is as high on the Civil side as on the Criminal. As a Judge he has little use for pedantry, preferring to be human and understanding rather than subtle. His rapid grasp of essentials, quick and ready sense of humour and strong commonsense, render it a pleasure as well as a privilege to appear before him. We have no doubt that before his term of office expires, he will be recognized as the possessor not merely of legal acumen and wide knowledge of the dry principles of law but as one who has truly promoted the administration of justice in this Province.

The Hindu Women's Rights to Property Act, 18 of 1937

by M. RAMA MURTI, M.A., B.L., VAKIL, *Vizagapatam.*

(Continued from page 63)

Now S. 3 (3) of this Act directly excludes the daughters from the benefit under S. 3 and S. 3 (1) excludes them by necessary implication (for want of words of devolution on daughters) and female inheritance along with the males is not possible under any School of Hindu law. A I R 1929 P C 162[6] referred to by Mr. Venkataraman relates to the interpretation of the term "lineal descendants" in connexion with the daughters of a woman named Sm. Moti Dai and as used in a will with reference to a monthly allowance. Seeing that for interpreting the terms as used in a will regard is had entirely to the intention of the testator as disclosed in the will read as a whole, it is not unreasonable to say that that interpretation can have no application in interpreting that term as used in this Act with reference to succession in law to a male, when admittedly under the law existing at the time of the passing of this Act the female descendants are excluded by the male descendants.

5. No doubt it would have been better if the definition of the term "lineal descendants" is given. At any rate an explanation could have been added to the effect that the term "lineal descendants" does not include the daughters of the propositus for the purposes of this Act.

Now S. 3 (1) proviso (1) shows that a widow of a predeceased son inherits "in like manner as a son" of "such predeceased son" and as such she is to be regarded as a "lineal descendant" along with whom the widow of the propositus takes a share. Under proviso (2) the widow of a predeceased son of a predeceased son has also to be regarded as a "lineal descendant" along with whom the widow and the widow of the predeceased son inherit. The words "in like manner as a son" show that the widow of the propositus is to be regarded for the purpose of inheritance alone as if she were a son of the propositus and similarly his widowed daughters-in-law as his son's son and the widowed daughter-in-law of his predeceased son as his son's son's son. Such being the case the term "lineal descendants" would necessarily include these widows. It is clear that it is for this reason that "lineal descendants" is used in S. 3 (1) instead of "male descendants".

6. In para. 11 of his article[1] Mr. Acharya asked whether the widow of a predeceased son takes a share in the presence of the widow and whether the widow of a predeceased son of a predeceased son takes in the presence of the widow and the widow of a predeceased son. Undoubtedly the answer is in the affirmative. Otherwise the proviso 1 to S. 3 (1) would have contained the express words "if there is no widow of the propositus" after the words "provided that" and proviso 2 would have contained the words "if there is no widow of propositus or the widow of a predeceased son" after the words "provided further that". Moreover the reasoning in para. 5 points to the same conclusion.

7. But it is a point for controversy as to whether the widow of the propositus takes his separate property under S. 3 (1) as a joint tenant with rights of survivorship or as a tenant-in-common with his male descendants. We need only discuss the case of the widow of the deceased since the same reasoning applies to the widows of the sons and grandsons. Under the Dayabhaga law there is no such thing as a coparcenership with rights of survivorship and this point arises only under the Mitakshara law. Under the latter system of law the male descendants of the propositus take his separate property as joint tenants or as tenants-in-common according as they were undivided or divided at the time the succession opened. Since under the Hindu law the widow is a sagotra sapinda and a member of the same joint Hindu family, and since under S. 3 (1) her share devolves upon her " in like manner as it devolves upon a son" and since under S. 3 (2) she is competent to hold the joint undivided interest of her husband in the coparcenary property and since finally under S. 3 (3) she is entitled in her own right to demand for a partition, it may follow that she is

6. Bhimnath Missir v. Sm. Tara Dai, (1929) 16 A I R P C 162=116 I C 608 (P C).

capable of taking as a joint tenant along with the male descendants if the latter were undivided when the succession opened. The circumstances that the widow is not a coparcener and that there is no identity of the estates taken by each in that the widow takes only a life-interest may show that the widow always takes only as a tenant-in-common with the male issue whether or not the latter take the same as joint tenants or otherwise inter se. In case they all took as joint tenants, then before a partition was effected among them if the widow died, her interest would survive to the joint family as a whole. But it is difficult to see how if one of the sons died his share would survive to the widow of the deceased as observed by Mr. Venkataraman except where he died without leaving his widow or male issue. The self-acquired property of the propositus is the ancestral property in the hands of his sons, thus attracting the provisions of S. 3 (2) in respect of it; moreover the sons' sons acquire a right thereto by birth. On the subsequent death of one of the sons of the propositus, his interest is taken under S. 3 (2) by his own widow, which interest is the same as the one held by each of his own sons, preventing survivorship to the other joint owners. Even in the absence of his own widow his undivided interest survives to his own sons under the Hindu law to the exclusion of the others.

8 (a). But where after the estate had been taken by them as joint tenants a partition was effected among the co-owners or where it was originally taken by them as tenants-in-common then on the subsequent death of the widow succession would open to the last male holder, namely the propositus, when obviously the widow of a predeceased son and the widow of a predeceased son of a predeceased son would also take a share under S. 3 (1) provisos 1 and 2 with the then existing male descendants of the propositus.

8 (b). This answers the question put by Mr. Acharya[1] in para 11 of his article. It is impossible to say that the interest of the widow lapses to the secondary widows.

8 (c). The same author observes in para 8 of his article that perhaps a vested interest is taken by the son in the share held by the widow of the deceased making it heritable. But it is difficult to see how it can be said to be so when it is not the case under the general Hindu law. It is submitted that on the determination of her life-interest the succession will open to her husband, i. e. the propositus, and in the case of succession to the lineal descendants, by the theory of representation in the various branches, the son, the grandson by a predeceased son and the great-grandson by a predeceased son of a predeceased son, all take together. We arrive at the same conclusion but by separate reasoning.

8 (d). Now in the same circumstances, on the death of the widow of a sonless predeceased son of the propositus or on the death of the widow of a sonless predeceased son of a predeceased son the succession opens to the last male holder, namely the propositus, and the provisions of S. 3 (1) and provisos 1 and 2 thereto will become applicable. But it must be noted that on the death of a widow of a predeceased son leaving behind him his own son or grandson or great-grandson or his own son's widow or grandson's widow, the succession opens to her own husband in spite of the fact that he had predeceased the propositus, excluding the other branches but attracting the provisions of S. 3 (1) with provisos thereto with reference to that branch alone, since her husband must be regarded as the last male holder for that share by the theory of representation.

9. As regards the quantum of interest that each of the widows mentioned in S. 3 (1) is to have, there is no difficulty. They are definite. It may be noted that a great-grandson's widow is excluded as being beyond the third degree.

10 (a). But when we come to S. 3 (2) the exact interest taken by a widow is not so definite. Is the interest taken by her liable to fluctuations prior to partition or is it definite?

(i) Suppose it is liable to fluctuations.

Then we have to consider that the deceased coparcener lives in his widow until she demands a partition when she takes that interest which her husband would have taken had he been alive till then.

Mr. Acharya[1] observes in para. 2 of his article that the widows of the predeceased sons and grandsons are not to have any rights if the propositus died a coparcener. It is difficult to see how it could be so when he himself observes in para. 12 that the interests held by them are liable to fluctuations in the absence of a partition, except in the case where he

died leaving his widow when she will take his share and then not only these secondary widows but the coparceners do not get anything. Suppose there is an undivided family consisting of a father *P* (whose wife had predeceased him) and his sons *A* and *B*. If then *A* dies leaving his own widow *W1* and a son *C*, the interest taken by *W1* is 1/2 of 1/3. If then *P* dies her interest is increased to 1/2 of 1/2 i. e., she takes something after the death of *P*. But if *P* should die leaving his widow *W*, she takes his 1/3 share and *W1*, *B* and *C* do not get anything. But on the death of *W*, *W1's* interest is increased to 1/2 of 1/2. On the death of *W1* the 1/4 interest held by her is taken by *C* alone.

(ii) Suppose it is not liable to fluctuations.

Then a strict interpretation has to be placed on the words "the same interest as he himself had" and the deceased coparcener is to be deemed to all intents and purposes to have separated himself at the moment of his death leaving all the rest joint and undivided and his widow gets the definite share held by him at the time of his death whatever may be the time when a subsequent partition is made.

11. In paras. 7 and 10 above both aspects of the case have been considered. The question is which view is more probable. With great respect to the learned Madras Advocates I submit that a widow does not take as a joint tenant under S. 3 (1) and her share is not liable to fluctuations under S. 3 (2). If that were not so she literally becomes a coparcener as understood under Mitakshara system of Hindu law. A coparcener acquires his right by birth, whereas a widow under the Act acquires a right not by birth nor even by marriage but for the first time on the death of her husband or husband's father or grandfather. Again, the right acquired by coparcener is a vested and veritable right whereas it is not so in the case of a widow under the Act. Again, the right acquired by a coparcener is an absolute estate whereas the right of a widow is expressly a limited right. The words "in like manner as a son" are used, it is submitted, rather to indicate the quantum of the interest taken by her than to indicate the tenure under which the estate is taken.

12. It may be of interest to note that "the same interest as he himself had" in S. 3 (2) and the share taken "in like manner as a son" under S. 3 (1) both work out to the same share, since in an undivided family the interest held by one member is equal to the interest held by each of his sons.

13. It is equally interesting to note that under S. 3, sub-ss. (1) and (2) a widow prevents her husband's share from lapsing to the other co-heirs or coparceners, as the case may be, just as effectively as a grandson or a great-grandson prevents his predeceased father's or grand-father's share from lapsing to other co-heirs. In other words, the theory of representation comes into play not only by the existence of a son or grandson of the predeceased son but also by the existence of the widow or the son's widow of such predeceased son.

14. The Act does not make it clear as to whether in cases where a man dies leaving two or more widows each of them takes a share equal to that of a son or whether they all take one such share. Under S. 3 (2) they all together take, with rights of survivorship inter se, the interest of their husband. But there is difficulty when we come to S. 3 (1). The Act contemplates the existence of a single widow in each class of cases and this seems to favour the former view. But the reasons given in paras. 11 and 14 favour the other view.

15. It must be noted that generally speaking the Act does not confer on widows any interests larger than those already possessed by them prior to the passing of the Act. Under the Hindu law as interpreted by the decisions of the Privy Council and the High Courts, the widow of the propositus is entitled to an annual maintenance not exceeding the annual income that could be derived from her husband's share. The widowed daughter-in-law acquires a legal right, on the death of her father-in-law, to be maintained out of his separate property. The compelling reason for the Legislature in passing the Act seems to be the almost universal neglect to so maintain them or to pay even a fraction of what they were justly entitled to. The Act in giving to the widow and the widowed daughters-in-law of the propositus merely a life-estate and a share equal to that of his son and his son's son respectively under S. 3 (1) and in giving to the widow of a coparcener merely a life estate and only an interest that her husband had in the family property under S. 3 (2), does no more than

make a sure and certain provision for their maintenance at a rate not more than what they were each entitled to prior to the Act, by clothing them with an independent right to demand for a partition.

There need therefore be no complaint that no provision is now made for daughters in this Act.

16. In conclusion it may be said that the Act requires amendments to be made at an early date to set at rest the above-mentioned difficulties.

Tax Dodging Is DANGEROUS

THREE CRORES ADDITIONAL REVENUE IN 1936-37

Finance Department's "Live Wires" On the Job

That the public exchequer would have been poorer by about Rs. 3 crores, but for the vigilance of the Income-tax Department is revealed in the annual report of the administration of the Department in India for 1936-37 just published.

Nearly 64,000 new assessees were discovered during the year while about 34,000 have been removed from the register.

If the reports made by the assessees had been accepted as correct, a sum of over Rs. 2,85,00,000 or about 25.4 per cent. of the actual revenue assessed on these persons would have been lost during the year.

Various devices for evasion of tax, such as double sets of accounts, false totals, false purchase figures, undervaluation of stocks, suppressed sales, etc., were attempted by assessees and detected by the Department.

Nicely Caught !

Here are a few examples :—

An assessee returned a loss of Rs. 719, but on examination it was found that he had been habitually concealing his income by various devices and escaping adequate assessment for some years. His income was finally ascertained to be Rs. 55,283 and the Income-tax Officer imposed a penalty of Rs. 5,000 in addition to the tax.

An assessee dealing in cloth filed a balance sheet which tallied to the fraction of a pie; the balance sheet was bogus; as several accounts were found missing, the accounts were then checked in minute detail and the totals of the cloth account were found to be completely wrong. After strenuous efforts copies of assessee's accounts in the books of several merchants were obtained and several omissions were discovered.

Concealment was proved and the assessment was made on an income of Rs. 16,448 as against Rs. 3,121 returned by the assessee. A penalty of Rs. 1,200 was imposed.

A silk-yarn dealer and moneylender tried to conceal his income by entering partial transactions in his books. He went to the length of entering bogus cash purchases. Figures of purchases and sales were collected from the accounts of local dealers which exposed his fraud. Assessments for 1935-36 and 1936-37 were made on incomes of Rs. 12,251 and Rs. 23,024 respectively and penalties amounting to Rs. 400 and Rs. 1500 were imposed.

Is It Worth It ?

Regular and systematic concealment was made for a number of years by an assessee dealing in Benares cloth. After strenuous efforts definite instances of omissions of sales from the accounts of the assessee's customers were collected. It was also found that the purchases were inflated. The assessee could give no satisfactory explana-

tion and as the accounts were proved to have been fabricated for income-tax purposes, they were rejected and assessment made on an income of Rs. 51,423 against Rs. 12,440 shown by him. Ultimately the assessee got off on payment of Rs. 5000.

An assessee paid a tax of Rs. 478 in 1934-35 and of Rs. 647 in 1935-36. The transactions shown in his books however did not tally with the reputation of his business. A surprise visit was paid to his residence and it was detected that duplicate books were kept by him. Basing the assessments on the real set of books, a sum of Rs. 1827 was recovered as tax *plus* Rs. 1375 as penalty.

An assessee used to enter some of his transactions in a separate set of books which were never produced before the Income-tax Officer and the profits whereof were never disclosed. Even in the returns for 1934-35 and 1935-36 the income in question was not disclosed. Penalties and additional taxes for these years amounting to Rs. 1746, were realised. He also paid Rs. 2221 for 1936-37, though previous to this detection he never paid more than Rs. 400 in any year except once in 1932-33.

Rupees Fifteen Crores Collected

The total demand for income-tax and super tax for the year was about Rs. 18½ crores which, after allowance is made for refunds, gave a net demand of over Rs. 16 crores. The net collection during the year was about Rs. 15 crores. The corresponding figures for the previous years were Rs. 20½ crores, Rs. 18 crores and Rs. 17 crores respectively.

Considering the abolition of tax on "low incomes," i. e. incomes between Rs. 1,000 and Rs. 1,999, and the reduction in the surcharge from one-sixth to one-twelfth of the tax, collection during the year was not unsatisfactory.

As income-tax is levied on the income, profits or gains earned in the previous year, the figures of assessment and collection are normally a reflex of the trade conditions in the year for which assessment is made. Based on a study of the figures for the year 1937, a useful summary is given in the report of the economic conditions in different provinces during the preceding year.

Provincial Trade Conditions

In Madras economic conditions were rather unfavourable. In the northern districts, rice and paddy trade was adversely affected by competition from outside provinces and a number of rice mills remained idle and dealers in paddy and rice made little or no profit. Groundnut trade also fared badly owing to the utter failure of crops. The cotton crop was poor and cotton mills made small profits. But prices of coffee, tea, paper, copper, areca nuts and potatoes remained more or less at their usual level and there was no appreciable increase in profits from these commodities. The fall in the prices of agricultural produce affected the income of rural money-lenders who found it difficult to realise their dues. Business in motor cars and hides and skins yielded fairly good profits while there was increased activity in the film industry which bids fair to develop on successful lines in the near future.

In Bombay, the improvement in trade which began in 1934-35 continued but there was no appreciable increase in the price of important commodities such as cotton, on which the major part of the trade of the province depends. Owing to unsatisfactory climatic conditions, the cotton crop was below the average and the ginning and pressing factories did not have a very prosperous time. There was, however, a welcome rise in the prices of ground nuts and oil seeds and the increased world demands for raw materials would have helped agriculturists but for the fact that unsatisfactory monsoon damaged their crops and left them almost where they were. Money continued to be cheap and investors turned their attention to landed properties. In consequence building contractors and dealers in building materials had a very busy and happy time throughout the year.

The improvement in the piece-goods trade noticed last year was not maintained owing to severe competition from Japan. Dealers in rice, timber, wines and spirits, grain and mill and general stores, had a better year. The legal and medical practitioners kept up their earnings. For insurance business, the year was more prosperous, but the greatest good fortune befell the iron and steel industry, which, on account of the unusual rise both in the demand and prices of its pro-

ducts as a result of the political situation in Europe, did a roaring trade.

Tea and Jute Yield More

Though the general tone of activities did not show any downward tendency, the year on the whole indicated no appreciable improvement for trade and industry in Bengal. The assessment in tea and jute yielded higher revenues than before, but little was realized from engineering and steamship companies owing to the fact that heavy unabsorbed depreciation of the previous years had to be allowed. Paper mills, electricity and insurance companies did well. Coal was as bad as before. The trade in Indian piecegoods was satisfactory but the British and Japanese piecegoods fared badly. The condition of the sugar business went from bad to worse and the mills were running at a loss. There was a drop in the income of petrol and tobacco companies chiefly due to price cutting competition.

In the United Provinces, trade conditions were no better than those of the previous year and this was particularly the case with sugar and textile industries. But oil factories earned good profits and the condition of trade in iron and hardware was fair. Traders in food grains did fairly well. The shellac industry nearly collapsed and the jute mills also fared badly. As a result of the action taken by the Government of Bengal in restricting the area of jute cultivation the crop was reduced by 33 per cent. and the price of jute went up in consequence by 40 per cent. The mills, on the other hand, in their anxiety to reduce working expenses went in for large-scale production with the result that the supply of the finished products outstripped the demands and prices fell.

In the Punjab there was improvement in the timber trade and the profits of sugar mills showed an upward tendency. As in Madras, there was a tendency on the part of the investors to divert capital to purchase and construct property as the rates of interest on moneylending business were considerably reduced. Agricultural produce showed some briskness, but owing to losses in cotton, there was no improvement in revenue. There was deterioration in the piecegoods trade and on the whole the trade conditions cannot be said to have shown any improvement over those of the preceding year.

Coal Crisis

Conditions remained practically unchanged in Bihar and Orissa. Coal mines passed through a serious crisis resulting in stoppage of work in various mines. Despite the slump there was a steady increase in the output of coal. Copper and iron products had a prosperous year owing to the increased demand, probably because of re-armament all over the world. The sugar industry on the whole, had a very unfavourable year owing to fall in the price of sugar. Rice and oil mills did fairly well.

Like the preceding years, 1935-36 also proved to be one of depression for the Central Provinces and Berar. The ginning and pressing concerns did not fare well owing to poor out-turn of "kapas". There was no appreciable change in grain and other allied businesses. Lac did not do so well as in the preceding year, while trade in manganese, coal and limestone continued to be dull. Dealers in cloth and general merchandise too did no better owing to the adverse trade conditions.

In Assam the yield from the tea industry was more or less on a par with that of the previous year. Professions and business of all types except ordinary agricultural produce showed slow and steady improvement.

Co-operative Movement: Slow Progress

In the majority of the provinces, the co-operative societies have not succeeded in ousting the village money-lender. In Madras the effect of the co-operative movement on the incomes of the money-lenders continue to be slight. The advent of the Loan Mortgage Banks and Co-operative Societies, has however affected the rates of interest to the detriment of the income from rural money-lending.

In Bombay the effects of the movement and the establishment of the Loan Mortgage Banks are not yet appreciably felt by the rural money-lenders and they continue to carry on their business as in the past. As they are not so strict as Co-operative Societies in the matter of security for loans to be advanced and the collection of debt and of interest, they are able to carry on their business as hitherto without any perceptible reduction therein.

In Bengal, Co-operative Societies and Village Loan Offices could not make any headway because they were careful with their capital and so were unable to meet the requirements of the agriculturists. This movement has not, therefore, adversely affected the money-lenders to any appreciable extent, though they had been hard hit first by continued general economic depression and then by the Bengal Rural Indebtedness Act and the establishment of Debt Reconciliation Boards.

Agriculturists' Relief Act

In the United Provinces the co-operative movement received some impetus from the passage of the Agriculturists' Relief Act and the Encumbered Estates Act, as since their passage the money-lenders have been reluctant to advance loans to landholders and agriculturists, who were therefore compelled to turn to co-operative societies for help and the organization is, in consequence, making some headway in villages.

In the Punjab the condition both of the rural money-lenders and co-operative societies is steadily deteriorating owing to fall in the prices of agricultural produce. Rural money-lending is steadily decreasing not so much because of the co-operative movement as because of the protection given by recent legislation to agricultural debtors.

In Bihar and Orissa the movement has not been very successful in releasing rural agriculturists from the clutches of the professional money-lenders.

In Central Provinces the movement does not seem to have affected the position of the village money-lenders much, as needy agriculturists on account of easy accessibility and non-insistence of regularity of payments found it more convenient to borrow money from the local money-lenders than from Co-operative Banks.

— *Indian Information Series, June 15, 1938.*

APPEALS FROM ORDERS

by P. C. BASU, BARRISTER-AT-LAW, *Calcutta.*

Ever since the Law Reports published the judgment of the Full Bench of the Rangoon High Court in 13 Rang 457 = AIR 1935 Rang 267,[1] doubts, difficulties and confusion have arisen in the minds of the Judges, legal profession and the litigants relating to the maintainability of an appeal from an order made by a Judge exercising original jurisdiction of the several Chartered High Courts on account of the numerous apparently conflicting decisions which one finds in the various Reports. In the course of his judgment in the above case Sir Arthur Page, Kt., K. C., Chief Justice, observed: "It would be a work of supererogation to analyse the numerous decisions on this question. Their name is legion." I have neither the presumption to do so within the narrow compass of this article.

The question which then troubled the said Chief Justice has ever since become a nightmare to many a litigant and a lawyer —It is unfortunate that the term "Judgment"* was used in the Letters Patents of the various High Courts in India. That twice blessed term "judgment" is responsible for such a controversy for nearly three quarters of a century. The said Chief Justice stressed rather too much on the fact that the terms of Letters Patent were settled in England and for an English lawyer in 1862 the term "Judgment" had a distinct and a special meaning. He however overlooked that the framers of the Letters Patent made no other provision therein relating to appeals from "orders" except what they included by the more comprehensive term "judgment".

I am not unmindful that the same English lawyer had made a slight variation in the clauses of the selfsame Letters Patent relating to appeals to His Majesty in Council by incorporating therein the expression final judgment, decree or order.*

There is a further provision immediately thereafter in the said Letters Patent relating to an appeal to His Majesty in Council from interlocutory "judgment" where one notices further the expression "Preliminary or interlocutory 'judgment', decree or

1. Dayabhai Jiwandas v. Murugappa, (1935) 22 A I R Rang 267=157 I C 1107=13 Rang 457 (F B).

* Letters Patent Cl. 15 of Cal. Bom. and Mad. ; Cl. 10 of All. & Pat.; Cl. 13 of Rang.

*Letters Patent Cl. 39 of Cal. Mad. & Bom.;Cl. 30 of All.; Cl. 37 of Rang.; and Cl. 31 of Pat.

order." In dealing with the opinion expressed by Sanderson C. J. (A I R 1918 Cal 850[2]) and McLeod C. J. (A I R 1926 Bom 136[3]), Sir Arthur Page observed :

> If these learned Chief Justices intended to hold that in every case the Court is at liberty to determine *ex cathedra* whether an order is a "judgment" within Cl. 13 [Rangoon] merely upon the terms of the particular order under consideration and without attributing any definite meaning to the word "judgment" in the Letters Patent, with all respect so to hold must necessarily lead to uncertainty and make "confusion worse confounded."

Sixtythree years rolled by before Sir Arthur Page made this discovery. The leading authority on the term "judgment" in the Letters Patent is the decision of Sir Richard Couch C. J. delivered in 1872 (8 Beng L R 433[4]). It had been accepted by all the other High Courts as such until the decision of Sir Arnold White C. J. in 1910 (35 Mad 1[5]). Since then upon one or the other of these authorities hang or purport to hang all the law and the other decisions upon the subject. Sir Richard Couch's definition of the term "judgment" had never been regarded as absolutely exhaustive and the Courts had always attempted to give it a wider meaning with a view to avoid a miscarriage of justice. Sir Arthur Page overlooked a very salient and important fact namely that the provisions in the Letters Patent of 1862 have been retained in the Letters Patents of Patna and Rangoon 1916 and 1922 respectively and the English lawyers who were responsible for framing them must have become aware of the meaning attributed to it by the High Courts in India for such a long period.

It is unfortunate that in the present day the High Court of Calcutta refused to be guided by a series of their own decisions based on the leading authority of Sir Richard Couch C. J. and regard the Rangoon view initiated by Sir Arthur Page C. J. as the correct view. The result is that even the earlier decisions of the Judicial Committee are sometimes ignored in order to emphasize the Rangoon view. Time has arrived when such diversity of opinion should be removed and a uniformity be brought into being with reference to the subject-matter of this article, so far as practicable, amongst all the High Courts in India.

According to Sir Arthur Page the term "judgment" is synonymous with the term "decree" with the result that in the opinion of his Lordship no appeal lies from an order unless such order is appealable by the Code of Civil Procedure. Sir Arthur Page purported mostly to rely on the use of the word "decree" in certain decisions of the Judicial Committee. I shall however refer to them and show that they do not wholly support him in the manner he did. In 48 Cal 481[6] at p. 488, the Judicial Committee was dealing with an order for security for costs under O. 41, R. 10 (2). Lord Sumner there observed that the regulations duly made by Orders and Rules under the Code of Civil Procedure 1908 are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal. The High Court's order as to security for costs was not a limit on the right to appeal, nor did it take away the right to appeal. In 30 C W N 459,[7] Sir John Edge observed:

> The term 'judgment' in the Letters Patent of the [Bombay] High Court means in civil cases a decree and not a judgment in the ordinary sense.

Sir John Edge's observation was not made with reference to the present question but to meet the respondent's contention that in the case before them, the trial Judge wrote out and delivered a judgment setting out his views as to the modification of rules relating to management and scheme of the public temple under the terms and authority of the original scheme approved by His Majesty in Council. His Lordship was laying stress on the point that every judgment written or delivered was not appealable. He was not determining the question that an "order" whatever its nature may be was not covered by the word "judgment" in the Letters Patent relating to appeals to High Court from orders.

The other decision relied on by Sir Arthur Page is the decision of Lord Atkinson in

2. Budhu Lal v. Chattu Gope, (1918) 5 A I R Cal 850=39 I C 465=44 Cal 804=25 C L J 193 =21 C W N 269.
3. Goverdhanlalji Maharaj v. Shri Chandraprabhavati, (1926) 13 A I R Bom 136=92 I C 552=27 Bom L R 1496.
4. The Justices of the Peace for Calcutta v. Oriental Gas Co., (1872) 8 Beng L R 433=17 W R 364.
5. Tuljaram Row v. Alagappa Chettiar, (1910) 35 Mad 1=8 I C 340=21 M L J 1=1910 M W N 697.
6. Mt. Sabitri Thakurain v. Savi, (1921) 8 A I R P C 80=60 I C 274=48 Cal 481=48 I A 76 (P C).
7. Sevak Jeranchod v. Dakore Temple Committee, (1925) 12 A I R P C 155=87 I C 313 =30 C W N 459 (P C).

the Income-tax Appeal from Bombay dealing with Cl. 39, Letters Patent [Calcutta, Bombay & Madras]. It is true that in 1923 Lord Atkinson reviewed all the English authorities and remarked that since there is nothing to show an intention in the year 1862 to use these words (final judgment) in a sense more extended than their legal sense, he came to the conclusion that an order of the High Court made under the provisions of Income-tax Act was not a final judgment. It was also held in that case that where a case is stated for opinion of the Court, it would be an indication prima facie that the order made would be only advisory. Lord Atkinson quoted in the said judgment, no doubt with approval, Lord Esher's observation: "A 'judgment,' therefore, is a decision obtained in action, and every other decision is an order. . . . ." Lord Esher again was dealing in that case with the provisions of O. 58 of the Rules of the Supreme Court of 1883 which ran as follows :

> No appeal to the Court of Appeal from any interlocutory order or from any order, whether final or interlocutory in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twentyone days, and no other appeal shall, except by such leave, be brought after the expiration of one year.

Surely the present question could not be said to come within the purview of that observation. In fact no appeal is being entertained, at any rate so far as the Calcutta High Court is concerned, from any "order" if such an order is not appealable under the Code and thus the series of decisions following the said leading authorities of Sir Richard Couch and Sir Arnold White are ignored and are characterised as bad law.

I have endeavoured to show that the opinion of Sir Arthur Page though entitled to great respect should not be the last word on the subject. It ignores the numerous decisions since 1862 whereby an "order" affecting, determining or concluding any right or liability between the parties has been deemed to have been included within the term 'judgment.' Bearing this in mind, in my humble opinion in the interest of everybody concerned the Civil Procedure Code or the Letters Patent should be amended with a view to give legislative sanction to the numerous authorities dealing with the present question.

The suggestion which I venture to make is that in S. 104, Civil P. C., two sub-paragraphs be added to sub-s. (1) thereof :

(i) An order made without jurisdiction or which a Court was incompetent to make.

(ii) An order affecting, determining or concluding any right or liability of any party to a proceeding or action or their representative-in-interest.

The first amendment I have proposed is based on the observations of their Lordships of the Judicial Committee reported in 9 Cal 482.[8] Sir Robert Collier who delivered the judgment of the Board observed that "they are unable to agree with the Chief Justice that if a Judge of a High Court makes an order on a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal or otherwise in setting right such a miscarriage of justice." The expression "incompetent to make" has been taken again literally from the decision of the Judicial Committee reported in 30 C W N 459[7] at page 462 (referred to above) to bring into harmony appeals from original jurisdiction with appeals to His Majesty in Council. If Sir Arthur Page is right then no appeal lies from such an order. It is not covered by any provision of the Code of Civil Procedure relating to appeals from orders.

The second provision is to give legislative sanction to the old Calcutta view which, ever since 1872, has been followed by the majority of the High Courts in India, before Sir Arthur Page made his famous pronouncement as aforesaid. I humbly draw the attention of the Legislature to set right the conflict of opinion for the benefit of everybody concerned.

8. Hurrish Chunder v. Kalisundari Debi, (1883), 9 Cal 482=10 I A 4=4 Sar 407=12 C L R 581 (P C).

The Code of Criminal Procedure (5 of 1898 as amended up to date), Third edition, by A. C. AMIN, B.A., LL.B. The book can be had from Eastern Law House, Law Publishers and Publisher's Agents, 15, College Square, Calcutta. Pages about 500. Price Rs. 4-8-0.

The author has done well in bringing out this edition as it is more than 4 years since the second edition was published. In this edition the notes have been revised, rewritten and enlarged and case-law has been brought up to September 1937. Though the book is principally meant for students appearing for law examinations, it is bound to be popular with the legal profession as a useful handy volume. The summary of the provisions of the Criminal Procedure Code and the select questions from law examinations given in the Appendices will be of special advantage to students. The printing and get-up are good.

The Arya Marriage Validation Act (19 of 1937), by C. L. MATHUR, M.A., LL.B., (CANTAB), B.SC. (PUNJAB). The book can be had from the University Book Agency, Law Booksellers, Kacheri Road, Lahore. Pages 40. Price Re. 1.

In the course of the Introduction which affords interesting reading, the author has explained the nature of the disqualifications which were imposed by the Special Marriage Amendment Act of 1923 which made it necessary for the Arya Samajists to demand the passing of this legislation. The previous Bills and Acts relating to this subject are given in the form of appendices.

Indian Company Law, by M. J. SETHNA, Barrister-at-law. The book can be had from D. B. Taraporewala Sons & Co., "Treasure House of Books," Hornby Road, Fort, Bombay. Pages over 400. Price Rs. 4-8-0.

In this book the author has explained the provisions of the Indian Companies Act as amended up to date and this he has done subject by subject, grouping together the various sections of the Act so as to form distinct and separate topics. The main principles of the law have been explained with references to the relevant sections and well illustrated by a number of English and Indian cases. In the Introduction the author has dealt with the several changes effected in the main Act of 1913 and their merits. The text of the Act as amended up to date has been included together with the forms and tables; and the Indian Company Rules have also been given. On the whole the book is sure to be much appreciated by law students, practitioners and all persons interested in company matters. The printing and get-up leave nothing to be desired.

The Indian Contract Act (9 of 1872 as amended up to date), Second Edition, by ANUKUL CHANDRA MOITRA, M.A. B.L. Published by R. N. Sanyal, M.A., B.L., Sri Gouranga Press, 5, Chintamani Das Lane, Calcutta. Pages over 800. Price Rs. 7-8-0.

In this edition the author has effected several improvements over the previous one. He has recast, re-written and much enlarged the text with reference to up-to-date case law. The synopsis under important sections with page references indicate the main topics dealt with in the commentary. Parallel references are given to cases cited. Principles of English law have been stated and the difference between that law and the Indian Act wherever it exists has been clearly indicated. Besides the Contract Act and other Acts with commentaries contained in the first edition, the author has given the Partnership Act also with commentaries in this edition. The book is the latest exhaustive commentary on the subject and is bound to be of great use to the Bench, Bar and the law students. The printing and get-up are good.

Malguzari Pratha (in Hindi), by CHOUDHARI KISHANLAL AMAINI. The book can be had from Purogami Vichar Mala, New Itwari Road, Mahal, Nagpur City. Pages 80. Price Annas 8.

We have great pleasure in acknowledging the receipt of the above book. The author has in a lucid way traced the growth of the Malguzari system in Central Provinces from its very origin and brought out the evils prevailing in it in a language which will be intelligible to any layman. Considering the price of the book and its timely appearance, we trust it will be welcomed by the public in general and the Kisans in particular.

MR. REGINALD TAAFFE SHARPE, BAR-AT-LAW

JUDGE, HIGH COURT, RANGOON.

SHARPE, REGINALD TAAFFE (The Honourable Mr. Justice Sharpe). Born 20th November, 1898. Son of Herbert Sharpe of Lindfield, Sussex. Educated at Westminster. Enlisted in His Majesty's Army, September 1916. Second-Lieutenant in His Majesty's Grenadier Guards, January 1917. Lieutenant, July 1918. Served in

France with the 2nd Battalion of that Regiment, 1917-18. Wounded at the Canal du Nord, September 1918. Called to the Bar at Gray's Inn, April 1920. Read in Chambers as a pupil of Mr. Herbert du Parcq (now the Honourable Mr. Justice du Parcq). Practised on the South-Eastern Circuit and at the Sussex (East and West), Brighton and Hastings Sessions. Contested North Lambeth as a Conservative and Municipal Reform candidate, at the London County Council Election in 1922. Judge of the High Court at Rangoon since June 1937. Married; two daughters.

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K. B. KAZI MIR AHMED KHAN, B.A., LL.B.

JUDGE, JUDICIAL COMMISSIONER'S COURT, PESHAWAR.

Belongs to the Kazikhel family of Peshawar City who have been administering Muslim law under the Durrani and Sikh rule.

Born on 11th May 1888 at Peshawar City, he was soon taken to Quetta where his father was employed in Government service. He passed his matriculation examination from the Sandeman High School, Quetta, and then joined the M. A. O. College, Aligarh from where he took the degrees of Bachelor of Arts and Law Literature.

He started practice at the bar in 1912 at Peshawar and soon made his mark in the profession. In a very short period he achieved great repute. The Law Officers of the Crown in the N. W. F. Province also were convinced of his ability by this time and in appreciation thereof he was nominated Additional Government Pleader and Public Prosecutor, Peshawar Division, in 1918. He soon parted with Government service because his career at the bar was retarded in that capacity. In 1928 however he was persuaded by Government to accept the appointment of Government Pleader and Public Prosecutor, Peshawar Division, and from that post he rose to the high office of the Legal Remembrancer of the N. W. F. Province in April 1932. After filling this position worthily for two years and in appreciation of his other services, he was appointed Additional Judicial Commissioner, N. W. F. Province in 1934.

Besides his professional career he took active part in the civil life of the city. He held the post of Vice-President of the Peshawar Municipality for nine long years, viz., from 1921 to 1930; also it was through his efforts that the Peshawar Electric Supply Company Ltd. was floated in N. W. F. Province which has proved a great source of comfort to the public of Peshawar City.

The title of Khan Sahib was conferred on him in 1927 and eight years afterwards the title of Khan Bahadur was conferred on him in 1935.

SECRETARY OF STATE ON FEDERATION

"WITHIN THE FRAMEWORK OF THE ACT"

Room For Accommodation

INDIA'S CHANCE OF POLITICAL UNITY

Congress' Record In Office.

Suggestions that modifications of the structure of Federation, embodied in the Government of India Act, 1935, were contemplated, were described as without foundation by the Marquess of Zetland, Secretary of State for India, in an important review of the immediate past and future of India at the Bombay Dinner in London on May 28.

Lord Zetland felt, however, that within the framework of the Act there was room to accommodate the reasonable requirements of both Provinces and States.

After paying a tribute to the services rendered to Bombay by Lord and Lady Brabourne and now by Sir Roger and Lady Lumley and after congratulating Lord Brabourne on his appointment by His Majesty to act as Viceroy during Lord Linlithgow's leave, Lord Zetland said :

No one can look back over the twelve months that have elapsed since the last Bombay Dinner without appreciating the magnitude of the changes which have been brought about in the constitutional field, nor, I think, will most people look back without feelings of considerable satisfaction that changes of this magnitude and complexity have taken place, with, on the whole, so little dislocation of the machinery of government.

Let me remind you briefly of the situation when the Bombay Dinner was held last year. At the time the outlook in India was shrouded in obscurity. We were, indeed, faced with a situation for which no precedents existed.

We had been at pains to provide the eleven provinces of British India with all the trappings of a full blown parliamentary system ; electorates had been brought into existence and elections had been held ; all, indeed, seemed to be going well, when suddenly, in six of the eleven provinces, the party which had secured a victory at the polls declined to take office. That was a thing which, in this country, does not happen, and I endeavour to discover the real reason for it.

The ostensible reason was the objection taken by Congress to the reserve powers vested in the Governors ; but the nature of these powers and the restricted field in which they were exercisable must have been well known to the Congress before they contested the elections ; for, they had been interminably and, I should have thought, exhaustively, discussed at the Round Table Conferences by the Joint Select Committee and subsequently by both Houses of Parliament.

I need not now recall in any detail the long-range exchange of views which took place between myself and the Congress, as well as between the Governor-General and the Governors and the Congress during the greater part of last summer.

Do Governors Interfere ?

The outcome was that the Congress appeared to be genuinely apprehensive that the Governors had powers to interfere in the policy of their Ministers over the whole field of administration and it was only when they were finally persuaded that this was not the case that they agreed to take office.

I have recently been furnished with a publication entitled "The Bombay Government and its Work —a review of the past six months"; it is a record of immense legislative and administrative activity. I can find in it no suggestion of any kind of any undue interference by the Governor in the policy or the acts of the Ministry.

I need mention only a few of the activities described :

A policy of complete prohibition is being prepared ;

The entire policy of irrigation is under revision;

A seven-year programme of road construction has been decided on and a special provision of Rs. 3¼ lakhs has been made for the construction of roads leading to villages ;

A Money Lenders' Bill has been passed ;
Radical changes in the constitution of local bodies have been taken in hand ;
Honorary Magistrates are being abolished ;
The possibilities of separating judicial and executive functions are being explored ;
Grazing fees for village cattle have been done away with.

But perhaps most significant of all is what has been done under the heading of law and order, since it was in this connection that the Congress feared more particularly the interference of the Governor.

Bombay Ministry's Claim

One of the first tasks of the Government, I read, was to revise or rescind the numerous orders issued by former governments under the Emergency and other laws. At one stroke Government lifted the ban on 227 associations declared unlawful under the Criminal Law Amendment Act. Thus continues the account: "Within three months' of the Ministry's taking office there was left not a single order issued by the Bombay Government under the Emergency Laws imposing any restraint on individuals or associations."

> **Such a record claimed by the Bombay Ministry itself is sufficient justification for the claim which I made last summer that the Ministries would be free to pursue their own policy over the whole field of internal administration.**

It was not, however, the Congress only who harboured fears as to the manner in which the new order would work, and the general feeling of relief at the disappearance of the first obstacle to the successful working of the new Constitution was tempered somewhat by second thoughts. True it was that Governments commanding the support of the Legislatures were now in office in place of the minority Ministries which had been functioning uneasily under the certain knowledge that they were destined to be defeated on their first encounter with the Legislatures; yet did not the Ministers in those provinces, at any rate in which the Congress were in office, belong to a party whose organisations not so long ago had been declared to be unlawful on account of the part which they had played in the Civil Disobedience Movement?

Could those who had deliberately broken the law be trusted now to uphold it?

I. C. S. Agents of Congress Policy

Moreover, the very Services whose members had been at open war with the Congress in those stormy days now found themselves the agents of Congress policy. How, it was asked, would Congress and the Services alike react to so paradoxical a state of things?

The situation was clearly a delicate one. It was not made easier by the programme on which Congress had fought and won the elections. Attacks upon the landlords and upon the capitalist system had given impetus to agrarian and labour unrest, while the prominence given to such items in their programme as the release of political prisoners and the removal of restrictions upon civil liberty imposed under the various Public Security Acts seemed likely to constitute an embarrassment to anyone charged with the duty of administering the law.

It is not surprising in these circumstances that there were many, both in this country and in India itself, who looked anxiously for a sign. Happily the sign came, haltingly at first, but with increasing definiteness as time went on.

> **I think that in Bombay you have been particularly fortunate in this respect, for under the lead of a Prime Minister of whom I hear from all sides nothing but golden opinions it has been made clear that liberty is not to be confused with license and that where necessary the law will be enforced. There was last autumn a grave prospect of serious labour strikes and it is largely due, I think, to the action taken by the Government that the risk of serious labour trouble has been avoided.**

Then, quite recently, we had an example of the determination of the Home Minister, Mr. Munshi, to see that outbreaks against public order are firmly repressed. A quarrel originating at a game of cards between a Muslim and some Hindus suddenly flared up into a serious riot. In the temporary absence from the city of the Commissioner of Police and the Secretary in the Home Department of Government, Mr. Munshi put in motion the police arrangements for dealing with such a situation.

Congress And Law And Order

Something like 2500 people in all were arrested and, as an aftermath of this disturbance, Mr. Munshi introduced in the Legislature a Bill to restore to the police the power of deporting undesirables from

Bombay City which had been rendered inoperative by a recent decision of the Courts. He acted with commendable promptitude. The usual seven days' notice of the introduction of a Bill was waived by the President at his request and the Bill, introduced on April 25, passed its third reading on April 29.

Let me add that if great credit is due to the Ministry for the way in which they are facing the realities of government, an equal measure of credit is due to the Services, both for the way in which they have adapted themselves to the changed conditions and for the extraordinary devotion to duty which they have displayed in times of great pressure of work carried out often in circumstances of no small difficulty.

The attitude of the Services and Ministries towards one another was described to me not long ago by a distinguished member of the Indian Civil Service as one of mutual surprise at finding that the other fellow was not black as he had been painted.

The Indian Civil Service and the Police Service are known as Secretary of State's Services, and it is not inappropriate, therefore, that I should take this occasion of expressing my great admiration and my deep appreciation of the services which they are rendering to India at this vitally important epoch in her history. I know something of the difficulties with which they are faced, I am very conscious of the tremendous pressure of work under which they labour, particularly, perhaps, at the headquarters of Government, and it is due to the loyal way in which they are discharging their duties that their worth is steadily being more fully recognized by those whom they serve.

It was with immense pleasure that I noticed a public appeal by a Minister in the Central Provinces for co-operation between the public and Government servants. "The Services", he declared, "must be kept contented if there is not to be a breakdown of the machinery of government", and he added that it would be unfair to interfere with the conditions of service under which Government servants had joined.

THE FEDERAL FUTURE

Modifications "Within The Framework"

One of the greatest achievements of Great Britain in India has been the gift of unity to her peoples. In spite of the immense differences of race and religion, of language and culture, her people are stirred today as never before by a consciousness of nationhood, and our task is to prepare in the constitutional sphere a dwelling place for this new consciousness. We have, that is to say, to bring beneath the dome of a single political edifice the new democracies of British India and the ancient autocracies of the Indian States.

There are, I know, criticisms of the federal provisions of the Act on the part both of the Princes and of those who speak for British India. Yet I should hope that room may be found within the framework of the Act to accommodate the reasonable requirements of both Provinces and States.

I can understand, for example, the views of those who will represent the Provinces in the Federation as a result of election that some element of popular choice as distinct from pure nomination should enter into the selection of those who represent the Princes. Well, that is for the Princes themselves to decide.

There is nothing in the Act to prevent it; nor will the Paramount Power be found standing in the way of any Prince who seeks to temper the rigid autocracy of bygone days with a more liberal system, as, indeed, some at least of the Princes are tending more and more to do today.

But here let me put in a word of caution. The fact that the Viceroy is shortly coming home on leave has given rise to speculation. I have seen it suggested that he is coming home to discuss with His Majesty's Government changes in the Federal structure embodied in the Act and I should fear that silence on my part in face of such suggestions might be assumed to indicate my concurrence with them.

Let me say at once then that so far as I am aware there is no foundation for any such suggestion. The Federal provisions of the Act were the outcome of prolonged and exhaustive examination and discussion over a term of years and in my view there is not the least likelihood of His Majesty's Government or of Parliament being willing to consider, before even the Federation has come into operation, any alteration in its structure.

Both the Viceroy and I are ready at all times to listen to comments on the Federal provisions of the Act, whether by the

Princes or by those who speak for British India.

But within the framework prescribed by Parliament there is, in my view, ample scope for providing the peoples of India with a degree of political cohesion which they have never before possessed in all the agelong epochs of their history. Let it not be said of India when this generation stands at the bar of history that they discarded lightly an occasion which it if be not now grasped may never recur.

Indian Information Series,
July 1, 1938

A rejoinder to Pandit Gajadhar Prasad Bhargava's article on "Judicial recognition of mortgages of occupancy tenancies and other non-transferable holdings in U. P." published in A. I. R. 1937 Journal 123

by BHAWANI PRASAD B.A., (HONS.) M.A., LL.B., Vakil, Allahabad.

Sections 23[1] and 34,[2] Agra Tenancy Act 3 of 1926 and their corresponding sections in the repealed Tenancy Act 2 of 1901 and S. 6 (*i*)[3], T. P. Act so unequivocally prohibit the transfers of occupancy tenancies that it is a shock to see an article with the heading "Judicial recognition of mortgages of occupancy and other non-transferable holdings in U. P.,"[4] because neither there has ever been nor can there ever be any judicial pronouncement in contravention of and in utter disregard of the clear and unambiguous provisions of the statutes.

Act 3 of 1926	Act 2 of 1901 *(Repealed.)*
1. **S. 23.** (1) The interest of an ex-proprietary tenant, of an occupancy tenant, of a non-occupancy tenant and of a statutory tenant to the extent provided by S. 20 is heritable but is not transferable either in execution of a decree of a Civil or Revenue Court or otherwise except in accordance with the provisions of this Act. (2) Nothing in the foregoing provisions of this section shall render it illegal for a tenant— (a) to transfer to Government his interest in any land which is required for public purpose; (b) to release or transfer his interest in favour of a co-tenant; Provided that no person shall be deemed to be co-tenant notwithstanding that he may have shared in the cultivation of the holding unless he was a co-tenant from the commencement of the tenancy or has become such by succession or has been specially recognized as such in writing by the landholder; (c) to sublet his holding as hereinafter provided.	**S. 20.** (1) The interest of a permanent tenure holder or a fixed rate tenant is a heritable and transferable interest. (2) The interest of an exproprietary tenant, an occupancy tenant, or a non-occupancy tenant other than a thekadar is subject to the provisions of this Act heritable but *is not transferable* in execution of a decree of a Civil or Revenue Court or otherwise than by voluntary transfer between persons in favour of whom as co-sharers rights originally arose or who became by succession co-sharers therein. (3) The interest of a thekadar is subject to the terms of his lease heritable but not transferable. **S. 21.** Where the interest of a tenant is *not transferable, he shall not be competent to transfer his holding* or any portion thereof otherwise than by sub-lease as hereinafter provided.
2. **S. 34.** (1) Every transfer other than a sub-lease made by a tenant in contravention of the provisions of this Act and every sub-lease made by a tenant in contravention of the provisions of S. 27 *shall be void.* (2) Every sub-lease made by a tenant in contravention of the provisions of this Act shall be voidable at the option of the landholder.	**S. 31.** (1) Every sub-lease or other transfer and every agreement to sublet or otherwise transfer made by a tenant in contravention of the provisions of this Act *shall be voidable* as hereinafter provided. (2) When a tenant has made any such sub-lease or other transfer the landholder may sue for the cancellation of the same, or for the ejectment of the tenant and sub-lessee or other transferee or for both. (3) Where a tenant has made any such agreement to sublet or otherwise transfer, the landholder may sue for the cancellation of the same. (4) In every such suit the sub-lessee or other transferee or the person entering into the agreement for the sub-lease or other transfer shall be made a party to the suit.

3. **S. 6.** *(i)* Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee.

4. A I R 1937 Jour 123.

Section 23 (1)[5] of the new and S. 20 (2)[6] of the repealed Agra Tenancy Act very clearly lay down that the interest of an occupancy tenant " is not transferable " i. e., it can neither be transferred voluntarily by means of a sale, mortgage or gift nor can it be sold in execution of decrees of the Civil or Revenue Courts. The only two instances in which it can be transferred subject to the conditions enumerated in the provisions to S. 23 (1) of the Act, are firstly, in favour of the Government for public purposes and secondly in favour of the co-tenant. It having thus forbidden the transfers of occupancy tenancies, further states the effect of their illegal transfers in S. 34[7] and the way in which such infringements of the statute can be punished under it in S. 82 (1).[8] According to the former section transfers in contravention of the Act are void and unenforceable in any Court of law. While according to S. 82 (1) parties to such unauthorized transfers are liable to be ejected on the suit of the landlord.

Here we may now consider the effect of S. 6 (*i*)[9] also of the Transfer of Property Act on mortgages of occupancy tenancies. It enunciates the well-established principle of law that all property is transferable[10] but makes an exception in their cases. Accordingly transfers inter vivos of occupancy tenancies, that is their sale, mortgage, gift and exchange are void under this Act also.

A study of the case law on the subject shows that the so-called mortgages (because they are not mortgages in the strict sense of the term) of occupancy tenancies can be divided into two classes (1) where the mortgagor actually delivers possession of the holding to the mortgagee and (2) where the mortgagor usufructuarily mortgages his occupancy tenancies and purports to deliver the possession to the mortgagee but fails to do so.

In the first class of cases, so long as the mortgagee's possession is undisturbed his interests are secure, though he as an usufructuary mortgagee apart from the fact that he holds an illegal mortgage can neither sue for the mortgage money nor for foreclosure.[11] But the difficulty arises when he is dispossessed of the holding by the mortgagor or by some one claiming through him or by the landholder himself under S. 82 (1),[12] Agra Tenancy Act or when the holding itself is destroyed. It is in these circumstances that the question is frequently raised whether the mortgagee of such an illegal mortgage can sue the mortgagor under S. 68,[13] T. P. Act, for the mortgage

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5. See foot-note 1.
6. " " 1.
7. " " 2.
8. **S. 82** (1) If a tenant (a) transfers his holding or any portion thereof contrary to sub-s. (1), S 34 or (b) makes a sub-lease of his holding or of any portion thereof which is voidable under sub-s. (2) of S. 34, both he and any person who may have obtained possession of the whole or any portion of the holding in pursuance of any such attempted illegal transfer or under any such voidable sub-lease, shall be liable to ejectment at the suit of the landholder.

Section 57 (d), Agra Tenancy Act 2 of 1901 :

A tenant not being a permanent tenure-holder shall be liable to ejectment from his holding on any one or more of the following grounds :

..... (d) on the ground that he has sub-let or otherwise transferred the whole or any portion of that holding in contravention of the provisions of this Act.

9. See foot-note 3.
10. In re Parry & Daggs, (1885) 31 Ch D 130 (134).
Venkataramanna v. Brammanna, (1869) 4 Mad H C R 345.
Lal Baijnath v. Chandrapal, (1924) 11 A I R All 795=83 I C 204=47 All 55.
Kartar Singh v. Bishambhar Sahai, (1929) 16 A I R All 578=116 I C 869=1929A L J 1151.
11. Chowdhri Umrao Singh v. Collector of Muradabad, (1859), S. D. A. R. 131 (133, 135).
Dutti v. Bahadur, (1875) 7 N W P H C R 65.
Jhabhu Ram v. Girdhari Singh, (1884) 6 All 298=(1884) A W N 97.
Luchmeshar Singh v. Dukh Mochan Jhan, (1897) 24 Cal 677.
Chathu v. Kunjan, (1889) 12 Mad 109.
12. Supra 8.
13. **S. 68.** (1). The mortgagee has a right to sue for the mortgage money in the following cases and no others ; namely :

(a) Where the mortgagor binds himself to repay the same.

(b) Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of S. 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient and the mortgagor has failed to do so.

(c) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor.

(d) Where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor.

Provided that in the case referred to in Cl. (a) a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage money.

money or in the alternative for the possession of the holding.[14]

The answer, being very simple, is in the negative.[15] Firstly, as tenants have no proprietary and transferable rights in tenancy lands, the provisions of the Transfer of Property Act relating to mortgages of immovable properties are quite inapplicable to them. Secondly, as the whole transaction being forbidden by the law is illegal, therefore the parties can in no way enforce the illegal mortgage deed[16] and the mortgagee cannot even enforce the personal covenant in it.[17]

Similarly in the second class of cases too the mortgagee as such for the above-mentioned reasons has no remedy against the mortgagor. He can neither sue him for possession[18] of the holding nor for the mortgage money.[19] However, according to the recent view of the Allahabad High Court in A I R 1935 All 256[20] though we do not agree with it in either class of cases, the only relief which the mortgagee is entitled to against the mortgagor or his representatives is "to the return of any money which he has been able to prove that he has advanced, under those void bonds",—a relief which has been considered to be in conformity with the principle laid down in S. 65, Contract Act.[21]

Even in spite of such clear provisions of the statutes recognized by overwhelming judicial authority, the author of the paper suggests that since the above decision mortgages of occupancy tenancies have been "judicially recognized" as valid. We are afraid, that by so doing he does not realize the untenable position which the acceptance of his view will create, because the moment we assume that their mortgages have been "judicially recognized" the conclusion that mortgagors and mortgagees of such illegal mortgages have all the rights and are subject to all the liabilities relating to mortgages of immovable properties such as redemption, foreclosure, marshalling and subrogation etc., is irresistible. But, obviously, this is not possible because tenants have no proprietary and transferable rights in occupancy holdings and the provisions of the Transfer of Property Act are wholly inapplicable to such illegal mortgages.

Section 58 of the T. P. Act defines "a mortgage" as

> the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

According to the section in every mortgage of immovable property there must, among other elements also be "the transfer of an interest" in the property mortgaged which is one of the most essential factors of a mortgage and no transaction is, in fact, a mortgage without it. Now in the case of occupancy tenancies, tenants have no other right in them except to occupy and use them subject to the provisions of the Agra Tenancy Act on payment of an annual rent. This does not amount to an interest in the property within the meaning of the above section and as such occupancy rights in the holdings are neither transferable under the Agra Tenancy Act [21a] nor assignable under the Transfer of Property Act[22] and therefore no mortgage can possibly be created on them. Accordingly any transaction in violation of the express and mandatory provisions of the statutes is not only illegal and unauthorized but also unenforceable in any Court of law.[23]

Having thus stated the law on the subject under discussion, we may now enter into the details of the author's article. The heading of the paper seems to suggest that

14. Dipanrai v. Ram Khelawan, (1910) 32 All 383 (386)=5 I C 557=7 A L J 330.
15. Har Pd. Tewari v. Sheo Govind, (1922) 9 A I R All 134=67 I C 793=44 All 486.
Kanhai v. Tilak (1912) 16 I C 42.
16. Har Pd. Tewari v. Sheo Gobind, (1922) 9 A I R All 134=67 I C 793=44 All 486 (488).
Sheo Narain v. Raj Kumar Rai, (1929) 116 I C 17.
17. Har Pd. Tewari v. Sheo Gobind, (1922) 9 A I R All 134=67 I C 793=44 All 486 (488).
Usman Khan v. Sitara Khan, (1935) 22 A I R All 256 (257)=157 I C 1096=1935 A L J 339.
18. Supra 14.
19. ,, 14.
20. Usman Khan v. Sitara Khan, (1935) 22 A I R All 256=157 I C 1096=1935 A L J 339.
21. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.

21a. Supra 1.
22. Supra 2.
23. Usman Khan v. Sitara Khan, (1935) 22 A I R All 256 (257)=157 I C 1096=1935 A L J 339.
Dipanrai v. Ram Khelawan, (1910) 32 All 383 (386)=5 I C 557=7 A L J 330.
Har Prasad Tewari v. Sheo Govind, (1922) 9 A I R All 134=67 I C 793=44 All 486 (488) =20 A L J 318.
Kanhai v. Tilak, (1912) 16 I C 42.
Sheo Narain v. Raj Kumar, (1929) 116 I C 17.

all forms of mortgages mentioned in S. 58, T. P. Act can be created on occupancy tenancies but a careful study of the section will soon show that howsoever illegal their mortgages may be, they are, if at all possible, only as usufructuary mortgages[24] and it is this variety which we invariably come across where the Agra Tenancy Act is applicable.

The author seems to derive his inspiration for the article from the recent decision in A I R 1935 All 256.[25] He considers it an authority for the fact that mortgages of occupancy tenancies have, as a result of the said decision, been recognized as valid in spite of their being declared void under S. 34, Agra Tenancy Act[26] and being forbidden by S. 6 (i)[27] of the Transfer of Property Act but it is clear from the following lines of his Lordship Bennet J.'s judgment in the very case that he has been misunderstood by the writer of the article:

> Following the principle laid down in A I R 1922 All 134[28] and 116 I C 17[29] I hold that the deeds cannot be enforced in any manner even as simple money bonds and therefore the plaintiff cannot sue for the promises of payment of principal and interest in the bond, nor can plaintiff rely on the covenant in the bonds that if possession is not given then the plaintiff should receive back the money received.

Thus, according to the very decision on which he bases his whole conclusion it is clear that the mortgage deed being in violation of the Agra Tenancy Act is void and no part of it can in any way be enforced in any Court of law.[30] The words "deeds cannot be enforced in any manner" in the judgment are wide enough to vitiate the enforcement of any of the stipulations of such illegal mortgage deeds so far as the parties and their representatives are concerned. The mortgagee can neither sue for possession[31] of the holding mortgaged (if he has not been put in possession by the mortgagor) nor can he sue for possession if he is forcibly dispossessed[32] by the mortgagor and lastly nor even can he be permitted to enforce the personal covenant.[33] It is surprising how the author has arrived at this conclusion on the authority in A I R 1935 All 256.[20] It only lays down that according to S. 65, Contract Act,[34] the mortgagee of an illegal occupancy mortgage is entitled to the return of any money which he has been able to prove that he has advanced under those void bonds. It should be noted that on the authority of *Usman Khan* v. *Sitara Khan*[20] he can get back only the principal and no interest on it for the simple reason that if it is also allowed it will amount to the enforcing of the personal covenant in the mortgage deed and thus granting a relief which is against the law.

The decision in A I R 1935 All 256 [20] is open to three objections. Firstly, S. 65, Contract Act is not applicable to it because the section contemplates the existence of an agreement or a contract and it has no application to a case in which there never was and never could have been any contract .[35] Now in the above case according to the well-established fiction of law, *ignorantia facti excusat; ignorantia juris non excusat*, the mortgagor and the mortgagee are presumed to know that transfers of occupancy holdings are prohibited by the Agra Tenancy and the Transfer of Property Acts and therefore no contract or agreement is possible between them of which the object is to create an illegal mortgage of occupancy tenancies and thus defeat the provisions of two statutes. Thus, when parties can never enter into such a contract or agreement no question of the application of Sec. 65 arises at all. The following lines from the unreported judg-

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24. It will be better to call them anomalous mortgages instead of usufructuary mortgages because, ouriously enough all the cases brought to the Court's notice contain a personal covenant for the payment of the mortgage money in case the mortgagee is dispossessed of the holding.
25. (1935) 22 A I R All 256=157 I C 1096=1935 A L J 339.
26. Supra 2.
27. Supra 3.
28. Supra 15.
29. Sheo Narain v. Rajkumar Rai, (1929) 116 I C 17.
30. Makund Lal v. Mt. Sunita, (1931) 18 A I R All 461=132 I C 422.
    Kanhai v. Tilak, (1912) 16 I C 42.
    Dipanrai v. Ram Khelawan, (1910) 32 All 383 (386)=5 I C 557=7 A L J 330.
31. Balgobind Bhagat v. Nagina Missir, (1913) 35 All 405=19 I C 745.
    Har Pd. Tewari v. Sheo Govind, (1922) 9 A I R All 134=67 I C 793=44 All 486 (488)=20 A L J 318.
    Kanhai v. Tilak, (1912) 16 I C 42.
32. Ram Sarup v. Ram Dular, (1925) 12 A I R All 736=87 I C 439.
33. Supra 28 to 31.
34. Supra 21.
35. Mohiri Bibee v. Dharamodas Ghose, (1903) 30 Cal 539=30 I A 114=7 C W N 441=8 Sar 374 (P C).

ment[36] of Straight J. will further elucidate the point :

In my opinion that section (i. e. S. 65) has no application to a case in which two parties with full knowledge of all the facts and the law presuming that they are well acquainted with the statutory prohibition against what they are doing, enter into a contract which is prohibited by law and the contract is executed to the full extent that it could be executed.

It was followed in the Division Bench case in 19 All 35,[37] which related to the sale of an ex-proprietary tenancy. The latter was in its turn followed by a Full Bench of our High Court in a similar case in 22 All 205[38] and thus the question of the application of S. 65 to such illegal transfers of ex-proprietary tenancies has, it appears, been concluded. As in these cases it has been consistently held by our High Court that the transferee is not entitled to any relief under S. 65, Contract Act, there seems to be no reason why the same view should not be adopted in cases of mortgages of occupancy tenancies which are exactly on the same footing with ex-proprietary tenancies and in fact governed by the same section of the Agra Tenancy Act so far as their transfers are concerned. The decreeing of such a plaintiff-mortgagee's claim who is a party to an illegal mortgage on the basis of Section 65 of the Contract Act, as has been done in A I R 1935 All 256[20] is in the words of Banerji and Aikman JJ. "to countenance an intentional violation of the law"[39] which is against public policy. Secondly, the maxim *in pari delicto melior est conditio possidentis* is also applicable to the above case and because the parties knowing the law as they are presumed to enter into a contract of mortgage of occupancy holdings which is prohibited by two statutes it is void under S. 23, Contract Act, and the parties being *in pari delicto*, the plaintiff mortgagee is not entitled to any relief as has been held by Straight J. in the unreported case[40] just referred to, relating to the transfer of ex-proprietary tenancies :

I am of opinion that the plaintiffs are not entitled to come in and seek the assistance of a Court of Justice to obtain money which as their share of the illegal contract was paid by them to defendants. It cannot be denied that both the plaintiffs and the defendants are *in pari delicto* in the matter of the contract and all that was done under it, it is equally clear that the defendants are persons who are in possession of the money paid to them by the plaintiff and being in position of defendants have the stronger position.

Thirdly, if it is suggested though there is no indication in the judgment in A I R 1935 All 256,[20] that the mortgagee should, on equitable grounds get back the money which he has advanced to the mortgagor, but as the plaintiff mortgagee of such an illegal mortgage with his eyes open enters into a contract the object of which is to defeat the provisions of the statutes he cannot therefore even get back the money which he has parted with. And this is, obviously so, because he has no equity in his favour to help him. It is astonishing that not one of the several cases cited above were brought to the Court's notice in A I R 1935 All 256.[20]

Next we come to sub-mortgages of occupancy tenancies. The author relies on 35 All 405[41] and A I R 1925 All 736[42] in support of the fact that though mortgages of occupancy tenancies have been held invalid, yet their sub-mortgages are valid. But the arguments advanced against their mortgages hold good in cases of their sub-mortgages too because it can never be conceded for a moment that the sub-mortgagee steps into the shoes of the original mortgagee and has all the rights and is subject to all the liabilities relating to mortgages of immovable properties under the Transfer of Property Act. The reasons are apparent. Firstly, the mortgagee cannot transfer any right to the sub-mortgagee which he himself does not possess and secondly as the mortgage itself is invalid, how can a valid sub-mortgage be created on its basis. Such a sub-mortgage will be an instance of a sub-mortgagee giving in security a plot of land to which he has no title under the law. We now discuss the cases individually. In the former case the plaintiff i. e. the sub-mortgagee did not get possession over the occupancy tenancy from its original mortgagee because he in his turn had not got possession over them. Therefore the sub-mortgagee sued the original mortgagee for a simple money decree and in the alternative for possession of the

36. Second Appeal No. 300 of 1889 in the High Court of Judicature, Allahabad.
37. Bhikam Singh v. Har Prasad, (1896) 19 All 35 =1896 A W N 167.
38. Murli Dhar v. Pem Raj (1900) 22 All 205= 1900 A W N 10 (F B).
39. Dipanrai v. Ram Khelawan, (1910) 32 All 383 (386)=5 I C 557=7 A L J 330.
40. Supra 36.
41. Balgovind Bhagat v. Nagina Missir, (1913) 35 All 405=19 I C 745.
42. Ram Sarup v. Ram Dular, (1925) 12 A I R All 736=87 I C 439.

holdings. Their Lordships expressed their opinion about the sub-mortgage as follows:

> He (sub-mortgagee) did nothing worse than if he had purported to make a mortgage of property which did not belong to him. In the absence of fraud there would be no illegality in this.

Hence, they granted the plaintiff a simple money decree for the principal and the interest claimed. But, it is submitted, that though the decision does not contravene any of the provisions of the Agra Tenancy or the Transfer of Property Acts, yet it militates against its spirit because when mortgages of occupancy tenancies are illegal and void[43] according to those Acts how can their sub-mortgages be considered valid?

The original mortgagee of occupancy tenancies derives whatever title he may be supposed to have from the void and illegal mortgage deed and when he in his turn purports to create a usufructuary mortgage on them on its strength because otherwise he can claim no right or title in them, he does nothing else except giving as security a property to which he lays his claim by virtue of a deed which is not only void ab initio, illegal and unenforceable in any way but can possibly convey no right or title to him in respect of those occupancy tenancies. Obviously such a sub-mortgage even if made bona fide is as illegal and void as the mortgage itself. Besides, if sub-mortgages of occupancy tenancies are held valid, it will amount to saying that parties to such transactions have all the rights (e. g. redemption, foreclosure, subrogation, marshalling, contribution, etc.) and are subject to all the liabilities arising out of mortgages of immovable properties. But as the ownership of the land rests with the landlord the provisions of the Transfer of Property Act relating to redemption, etc. just referred to are absolutely inapplicable either to mortgages or sub-mortgages of occupancy holdings. Hence in this case too, it is submitted that a money decree for the principal and the interest should not have been granted but the plaintiff mortgagee's suit ought on the principle of *ignorantia juris non excusat* have been dismissed in toto.

The second case cited by the author supporting the sub-mortgage of occupancy tenancies is that in A I R 1925 All 736.[44] As it follows the decision in 35 All 405,[41] the arguments advanced against the latter are applicable to it also.

In the latter part of his paper the author has tried to dispose of three other points connected with the subject summarily. We propose to discuss each of them.

I. On the authority in A I R 1929 All 223[45] he suggests that such illegal mortgages have been held valid as between the mortgagor and the mortgagee. But the case, it might be mentioned, has nothing to do with mortgages of occupancy tenancies prohibited by the Agra Tenancy and the Transfer of Property Acts. It relates to khaekar tenure.

II. He suggests that as usufructuary mortgagees of occupancy tenancies who have been ousted from possession of the holdings by the mortgagors can, if they sue within six months, get back their possession over the holdings under S. 9, Specific Relief Act, hence their mortgages are valid. There is no doubt about their recovering the possession but this does not mean that mortgages of occupancy tenancies are therefore valid. The said section provides for a summary proceeding and affords relief against the disturbance of possession alone. It leaves the question of title uninvestigated for a separate suit. The dispossessed mortgagees of such holdings do not get back possession under the section because they have a better title against the mortgagor but for the simple reason that their possession has been disturbed. They cannot get it back from the mortgagor on the basis of title simply, because they have none.[46]

III. Relying on A I R 1927 All 669[47] and A I R 1927 All 311,[48] he thinks that if such mortgagees sue the mortgagor or his representatives for possession even after six months they will get it back on the basis of the principle that possessory title is good against everybody except the true owner. But neither of the two cases just cited supports his contention. In the former case the mortgagee did not sue the mortgagor for possession but the suit was against two strangers whose possession was nothing better than those of trespassers and

43. Supra 1 and 2.
Har Nandan Rai v. Nakchhedi Rai, (1906) 3 A L J 691=1906 A W N 302.
44. Ram Sarup v. Ram Dular, (1925) 12 A I R All 736=87 I C 439.
45. Gaje Singh v. Mt. Uchhaba, (1929) 16 A I R All 223=119 I C 514=1929 A L J 309.
46. Sheo Zoor Koeri v. Mt. Kausilla, (1923) 10 A I R All 81=20 A L J 972.
47. Ganesh v. Dasso, (1927) 14 A I R All 669=103 I C 428=25 A L J 857.
48. Maha Mangal Rai v. Kishun Kandu, (1927) 14 A I R All 311=100 I C 346.

besides it was brought within a month from the dispossession. On the other hand, the second case was a suit for redemption of an occupancy holding, hence it has nothing to do with a mortgagee's suit for possession. We doubt if any case can be referred to where the mortgagee of occupancy tenancies has been, after six months from his dispossession, allowed to recover possession from the mortgagor on the basis of his possessory title.

IV. The author's other contention that suits for the redemption of occupancy tenancies have been held valid is also without any authority. He relies on the cases in 35 All 405[49] and 32 All 628.[50] The first one has already been discussed and it might be added that it was not a suit for redemption of the illegal mortgage but the sub-mortgagee of occupancy tenancies sued the original mortgagee of such tenancies for the mortgage money and in the alternative for possession of the holdings. Regarding the second one it is sufficient to mention that it was a case governed by the N. W. P. Rent Act of 1881 according to which mortgages of occupancy holdings were perfectly valid.[51]

In this connexion the decisions in A I R 1927 All 311[52] and A I R 1934 All 656[53] deserve some attention.

In A I R 1927 All 311,[52] the mortgagor of occupancy tenancies sued the mortgagee for the redemption of the mortgage. Iqbal Ahmad J., following the case in 47 Mad 203,[54] held :

> A mortgage of an occupancy holding is no doubt not permitted by law but by entering into possession as mortgagees of the holding in dispute and by continuing in such possession for more than 12 years, the defendants could only prescribe a title for the limited interest of a usufructuary mortgagee and . . . . (2) In my judgment, Art. 142, Lim. Act has no application to the present case. A suit for redemption of a usufructuary mortgage is no doubt in substance a suit for possession of immovable property but the period of limitation for such a suit is that provided by Art. 148, Lim. Act and it is that Article which governs the present case.

But it is submitted that the decision is bad in law on the following grounds: Firstly, there is not the remotest analogy between the Madras case[54] and that in A I R 1927 All 311[52]. In the former case transferable property was usufructuarily mortgaged for Rupees 200 by an unregistered mortgage deed which was inadmissible in evidence because of S. 49 of the Registration Act, and it was under these circumstances that it was held that the defendants in the case by remaining in possession for 15 years prescribed for and acquired the interest of a mortgagee by adverse possession and hence it gave rise to the relationship of the mortgagor and the mortgagee between the parties and the mortgagee could not be permitted to assert absolute title in the property. A I R 1927 All 311[52] stands on a different footing altogether. In this case the plaintiff usufructuarily mortgaged occupancy holdings whose transfers are prohibited by two enactments and then sought to redeem them. The principle laid down in the Madras case[54] is wholly inapplicable to the present one. Secondly, sheer lapse of time cannot give legality to a contract of mortgage of occupancy holdings prohibited by the Agra Tenancy and the Transfer of Property Acts and which, the parties knowing the law, as they are presumed to, cannot enter into. When there can be no such contract or agreement of sale, mortgage, gift or exchange of occupancy tenancies, much less can the mortgagee of such an illegal mortgage as in the above case "prescribe a title for the limited interest of a usufructuary mortgagee."

There is no authority either in the English or in the Indian law for the above view. Neither is it in consonance with the principles of justice and equity. Thirdly, as the parties to the mortgage of occupancy holdings knowingly enter into the contract the object of which is to defeat the provisions of two statutes, they are *in pari delicto* and there is no equitable ground still less any provision either in the Agra Tenancy or the Transfer of Property Act or even a judicial pronouncement favouring the view that the mortgagor's pure and simple suit for redemption of such an illegal mortgage should be treated as a suit for possession. Fourthly, parties to the illegal mortgage are, as already remarked *in pari delicto* and hence the mortgagee being in possession is, according to the maxim *ex pari delicto melior est conditio possidentis* in a better position and cannot be deprived of his possession of the occupancy holdings

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49. Supra 41.
50. Ram Pargas Upadhya v. Suba Upadhya, (1910) 32 All 628=6 I C 837=7 A L J 755.
51. Supra 50.
52. Maha Mangal Rai v. Kishun Kandu, (1927) 14 A I R All 311=100 I C 346.
53. Mt. Dukhi v. Inderman Ahir, (1934) 21 A I R All 656=153 I C 903.
54. Appanna v. Venkatasami, (1924) 11 A I R Mad 292=79 I C 510=47 Mad 203=45 M L J 667.

on the suit of the mortgagor, Fifthly, as no suit like that in A I R 1927 All 311[52] is for the above-mentioned reasons maintainable, no question of the application of any Article of the Limitation Act arises. However it might be added that Article 148 of the said Act contemplates the existence of a mortgage and it is obviously not applicable to cases like those of occupancy holdings where there should, possibly be no mortgage at all. Sixthly, if the mortgagee of occupancy tenancies is allowed a money decree for the amount which he advanced to the mortgagor under S. 65, Contract Act, as held in A I R 1935 All 256[55] and the mortgagor's suit for redemption of such an illegal mortgage is decreed as being considered a suit for possession, the purpose of S. 23,[56] Agra Tenancy Act, and S. 6 (i),[57] T. P. Act, will thus, be very easily defeated.

The objections against the decision in A I R 1927 All 311[57a] are mutatis mutandis applicable to A I R 1934 All 656.[58]

In the light of the brief exposition of the law above relating to transfers of occupancy tenancies we fail to find any justification for the author's concluding lines.

The result therefore is that though a mortgage of non-transferable tenure is not valid it is not prohibited or forbidden and the Courts do not penalize the mortgagees beyond refusing to grant them a decree for foreclosure or sale.

55. Supra 20.

56. Supra 1.
57. Supra 3.
57a. Supra 52.
58. Supra 53.

THE POSITION OF A NOMINEE UNDER S. 39 OF THE NEW INSURANCE ACT

by BISHAN NATH, ADVOCATE, HIGH COURT, LAHORE.

Before the present Act was passed, the position of the nominee appointed in a life policy was very uncertain. In the present Act an attempt has been made to define his position, but by the addition of the last clause his position in cases where the nominee is wife and children or any of them is still uncertain. A man who pays the premium is entitled to receive the benefit when the policy matures. In case he names a person in the policy for receiving the money, the presumption is that such a person is only an agent appointed by the policy-holder to receive money on his behalf for payment to the person or persons who are really entitled to its benefits. The appointment of such a person should be considered to be under the control of the policy-holder. Such an agent can be changed at any time. This principle was followed in A I R 1928 Cal 518[1] where it was held that a mere nominee in a policy cannot enforce claim against the company, he being not a party to the contract. By the appointment of a nominee the character of the policy does not change and the money due on the policy remains the property of the policy-holder. This interpretation of the law is independent of S. 6, Married Women's Property Act. S. 6 says :

A policy of insurance effected by any married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children, or of any of them according to the interest so expressed and shall not so long as any object of the trust remains be subject to the control of the husband or to his creditors or form part of his estate. When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee.

It has been held in different decisions of the High Court of Madras that no special form is necessary to bring a policy within the provision of the Married Women's Property Act. In case a wife is appointed a nominee, it is held that the policy is governed by the Married Women's Property Act. Great difficulty was experienced by the Insurance Companies at the time of settling the claim where the nominee was wife or child. The questions generally arose :

(1) Whether the nominee can be changed by the policy-holder ?

(2) To whom the payment is to be made when the wife or child is a nominee ? Whether to the Official Trustee or directly to the nominee ?

(3) In case of death of the nominee, whether the money due on the policy was to be paid to the successors of the nominee or to the policy-holder or to his heirs and executors ?

1. Krishna Lal v. Pramila Bala Dassi, (1928) 15 A I R Cal 518=114 I C 658 = 55 Cal 1315= 47 C L J 587=32 C W N 634.

All these questions can be answered if the company can decide whether by the appointment of a nominee the policy remains under the control of the policy-holder. Under the state of law as it existed the Insurance Companies could not definitely decide this point. On first reading of S. 39 of the present Act one feels that all these doubts have been set at rest but in reality the position of the nominee in cases where the person nominated is the wife and child or any of them still remains doubtful. In the first six clauses it is expressly laid down that by the appointment of a nominee the policy remains under the control of the policy-holder. He can change the nominee at any time. In case of the survival of the policy-holder, the amount belongs to him. By the transfer or assignment of a policy a nomination ipso facto comes to an end. But when we come to para. 7 we find that we are where we were before the enactment of S. 39 of the present Act.

In Clause 7 it is expressly stated :

The provisions of this section shall not apply to any policy of life insurance to which S. 6, Married Women's Property Act applied.

No doubt in ordinary cases control over the nomination is given to the policy-holder. He can change the nominee at any time he likes. But in case the nominee is wife or wife and children or any of them, this interpretation would be incorrect. According to S. 6, Married Women's Property Act, if a policy is taken for the benefit of the wife or wife and children or any of them, it goes beyond the control of the policy holder and it is deemed that a trust is created for the benefit of the wife or of the wife and children or any of them and when the sum secured by the policy becomes payable it shall, unless special trustees are duly appointed to receive and hold the same, the sum shall be paid to the official trustee.

(to be continued)

Reviews

The Law of Torts, *by* L. B. BHOPATKAR, M.A., LL.B., Vice-Principal, Law College, Poona. Published by the author himself. Pages over 400. Price Rs. 4.

In the fourth edition under review of this popular book, the author has revised, rewritten and enlarged the statement of law in regard to most of the topics under the Law of Torts. The principles of law have been clearly stated and classified and tabulated wherever possible or necessary in order to enable readers to save much time and trouble. A synopsis of the important points discussed is given at the beginning of each chapter. The case law has been brought up to June 1938. The General Index, Table of Cases, Maxims, Leading Cases and doctrines cited in the book are separately given which will greatly facilitate reference. The questions and answers will be of special interest to students appearing for law examinations. The author has taken pains to write the book in such a manner that it will be useful not only to students but also to busy practitioners. The printing and get up are good and price is very moderate.

The Indian Income-tax (Amendment) Bill, 1938 : Its scope and effect, *by* RAGHUPATI GHATAK, MA., M.L., Calcutta. Published by Amalendu Ghatak, B.Sc., P 620, Monoharpukur Road, Kalighat, Calcutta. Pages 124. Price Rs. 3.

We have pleasure in acknowledging this book. The Government have invited opinions from all individuals and organisations about the proposed Bill. The author has clearly explained the full implications of the proposed changes in the Income-tax Act sought to be introduced by this Bill. The book will be of great advantage to the public interested in this branch of law in enabling them to place before the Government their opinions about the proposed amendments.

THE POSITION OF A NOMINEE UNDER S. 39 OF THE NEW INSURANCE ACT

by BISHAN NATH, ADVOCATE, HIGH COURT, LAHORE.

(Continued from p. 96.)

Different cases have been decided in which it has been held that no special form is necessary to bring the policy under the Married Women's Property Act. In a case reported in A I R 1932 Mad 220[2] in the column "To whom payable", the reply was "The assured or his wife if he predeceases her" and it was held that the Married Women's Property Act did apply and a statutory trust in favour of the wife has been created. In a case reported in A I R 1938 Sind 20,[3] under the heading "Person or persons to whom the sum assured is payable", the words were "Shr. Parmeshwari aged 17 years, the wife of the life assured." A I R 1932 Mad 220[2] was followed and it was held that a trust was created in favour of the wife. There are certain authorities which have expressed different views. In a case reported in A I R 1934 Bom 296[4] it appeared that the sum payable under the policy was payable at death or at age 55 with profits to the assured, but in the event of his death before his wife, it was to go to the wife and failing her, to the assured, his executors, administrators or assigns. It was held that the policy was for the benefit of the assured himself and inasmuch as it would be payable to him if he would attain the age of 55, it forms part of his estate and no trust was created. It was also held that in order to apply S. 6, Married Women's Property Act, the trust that is to be created must be a trust which is not conditional upon some event happening but which must come into operation just at the time when it is created by the policy. In a case reported in A I R 1937 Mad 645,[5] under the heading "For whose benefit and to whom payable" are the words "Assured or his wife if he predeceases her." The learned Judge observed that during the life-time of the assured he was not fettered by any trust as a trust would only arise upon his death. But regarding the Bombay ruling, the learned Judge remarked that the case is entirely irrelevant to the point because there the policy had been expressed for the benefit of the wife.

Again, in A I R 1938 Mad 413,[6] it was stated that the amount due on the policy should be paid to the assured at the expiry of the period of 15 years or to his wife on the death of the life assured if earlier. The learned Judge observed :

> The position therefore in law is that there is a trust expressed on the policy in favour of the wife. At the same time, it cannot be said that the assured has no interest in the policy because in a certain event, namely after the expiry of 15 years from the date of the policy, the money thereunder is to be paid to him if he is then alive and it is only in the event of his death within this period that the money could be paid to his widow if she is then alive. The policy thus constitutes property in which both the assured and his wife have interest. It is not possible to say at present what that interest is, because it is entirely dependent on the events above referred to.

Before these observations, at another place the learned Judge has observed :

> I am of opinion that if the words found in the policy lead to the conclusion that the policy was for the benefit of the assured's wife, then according to S. 6, Married Women's Property Act it shall be deemed to be a trust. This does not mean of course that the wife is entitled to claim anything by virtue of the above trust straightway. The benefit which accrues to her under the trust will be subject to other conditions in the policy. But the trust is impressed upon the policy from the moment the policy comes into existence and it cannot, in my opinion, be said that the trust comes into existence for the first time only after the event which is to determine the payment under the policy. In other words the wife will not be, entitled to claim anything under the policy unless the event referred to above in the policy happens. But the trust is brought into existence the moment the policy is taken out for the benefit of the wife. That being the case, the trust attaches itself to the policy from the very moment of its birth.

Reviewing all these authorities, one is forced to come to the conclusion that in a case where the wife and children or any of them is a nominee, although there may not be any express words saying that the policy is for their benefit, a trust is created, although in A I R 1938 Mad 413[6] an attempt is made to hold that it is conditional trust. In A I R 1937 Mad 644[7] and A I R 1934

2. Abhiramavali Ammal v. Official Trustee of Madras, (1932) 19 A I R Mad 220 = 141 I C 680=55 Mad 171=62 M L J 111.
3. Parmeshwari Bai v. Nihal Chand Lal Chand, (1938) 25 A I R Sind 20 = 173 I C 457 = 32 S L R 138.
4. Dinbai Hormasji v. Bamansha Jamasji, (1934) 21 A I R Bom 296=152 I C 168=58 Bom 513 =36 Bom L R 608.
5. Lalithambal Ammal v. Guardian of India Insurance Co. Ltd., (1937) 24 A I R Mad 645= 169 I C 481=(1937) 1 M L J 735.
6. Kannayalal v. Subbaraya Chetty, (1938) 25 A I R Mad 413=(1938) 1 M L J 281.
7. Kelu Kurup v. Subramania Ayyar, (1937) 24 A I R Mad 644=174 I C 125=(1937) 2 M L J 299.

Bom 296,[4] it is laid down that in order to apply S. 6, Married Women's Property Act, a trust is to be an unconditional trust. But this view has not been accepted in the latest Madras authority and by the Judicial Commissioner of Sind. Under the circumstances and in the state of law as expressed above, it is doubtful whether a policy in which the nominee is a wife, wife and children or any of them, remains under the control of the policy-holder and he can change the nominee at his sweet will.

Note.—After this article was sent to the Press, another judgment has appeared in A I R 1938 Mad 604[8] (July Part) at page 605. In this case the proposal was for an endowment policy payable in 15 years. Cl. 12 of the proposal intended to contain the name of the person nominated to receive the sum assured. In this case the words entered were "Self or Wife Velayammal." It was held that a contingent trust was created. This view is in consonance with the view expressed in 55 Mad 171=A I R 1932 Mad 220[2] and A I R 1938 Mad 413.[6]

8. Krishnan Chettyar v. Velayee Ammal, (1938) 25 A I R Mad 604=(1938) 2 M L J 22 (F B).

A NOTE ON SECTION 81 OF THE T. P. ACT

by R. S. SRINIVASACHARYA, M.A. B.L., *Advocate, Mylapore, Madras.*

The books disclose a remarkable conflict of opinion on the question as to what exactly is the right of marshalling conferred on a puisne mortgagee under S. 81, T. P. Act, and also as to how far such a right can be affected by a release made by the prior mortgagee of his lien over a portion of the hypotheca which is other than the one mortgaged to the puisne mortgagee.

2. Though the question appears to be simple in form, yet there are two sets of views on the matter, as already indicated, one, holding that S. 81 cannot apply to cases where the "other estate" has been released by the prior mortgagee, while the other set of cases holds that notwithstanding the release, S. 81 will undoubtedly apply. Representative cases in support of the first view, are to be found in 51 Mad 648[1] and A I R 1930 Lah 71;[2] the second mentioned view is held in several cases, for example A I R 1935 Rang 139[3] and 34 All 606.[4] It may at once be submitted that the view taken in the latter set of cases is, with respect, the correct one.

3. The relevant provision of the statute which, as already mentioned, is to be found in S. 81, T. P. Act, is familiar to the profession and need not be quoted. It may be noted in passing that that Section has now been amended by Act 20 of 1929 and that the amendment has the effect of liberalizing that provision in several respects, which it is not necessary for the purposes of this note to mention.

4. Reading that Section, uninfluenced either by any considerations derived from the English law on the point or from the history of the Indian case-law, it appears to be clear enough that (1) the puisne mortgagee gets a definite right under the Section ; (2) that right is always available and comes into being, so soon as the second mortgage is itself created (3 Pat 522[5]) ; (3) that such a right could not be affected or whittled away to any extent except under one circumstance, namely "prejudice" to the prior mortgagee or persons who have acquired an interest in property for valuable consideration ; (4) that such a "prejudice" can be deduced only in cases where it is caused by any act, which is beyond the control of the prior mortgagee; and (5) that it cannot be reasonably said that where the prior mortgagee voluntarily relinquishes, without justification, his lien over any portion of the hypotheca, he cannot claim to have suffered any prejudice and thereby claim to exclude the operation of Section 81.

5. If the above deductions are correct, it appears to be obvious that the only material point to consider when the right of marshalling is claimed, is to see whether there is any justification for saying that any prejudice will be caused to the prior mortgagee by the exercise of the right of marshalling. It may be conceded that in cases, for example where the "other estate" has deteriorated in value or is the subject-matter of litigation or is otherwise difficult

1. Thammul Sowcar v. Nattu Rama Doss Reddiar, (1928) 15 A I R Mad 500=110 I C 54 =51 Mad 648=55 M L J 358.
2. Prem Das v. Sarbaland, (1930) 17 A I R Lah 71=120 I C 481.
3. Ram Sabad v. Subiah Naidu, (1935) 22 A I R Rang 139=156 I C 318.
4. Jugal Kishore Sahu v. Kedar Nath, (1912) 34 All 606=16 I C 401=10 A L J 211.
5. Rajkeshwar Prasad v. Md. Khalilul Rahman, (1924) 11 A I R Pat 459=78 I C 796=3 Pat 522=5 P L T 223.

of realization or both the funds do not stand on the same footing, *Webb* v. *Smith*,[6] the 'double creditor' or 'the creditor with the double fund'—as he is described in some of the cases—may have a right to complain of prejudice and thereby exclude the doctrine of marshalling (see the circumstance detailed in Ghose on Mortgages, Vol. 1, p. 350). Except under such circumstances it would seem to follow that, other conditions of the Section being satisfied, the puisne mortgagee has got an indefeasible right to exercise the right of marshalling.

6. But then, as stated, some of the cases hold a contrary view. The main grounds on which that view is based may be formulated as follows : A. The prior mortgagee has got an absolute right to elect against which fund he will proceed for the satisfaction of his claim : 51 Mad 648.[1] B. That any interference with this right will certainly amount to 'prejudice' (ibid). C. The English law on the point allows the right of marshalling only as against the mortgagor and his legal representatives (ibid at p. 650). D. The right of marshalling is not available at all against the mortgagee but only against the mortgagor and volunteers claiming under him (ibid at p. 654). E. S. 56, T. P. Act, leads to the same conclusion (ibid at p. 652). F. The recognition of a right of marshalling, even in cases where the prior mortgagee releases his lien over the 'other estate', would be to violate the principle underlined in S. 60. T. P. Act : 40 Mad 968[7] and 14 Rang 198.[8] G. The material time for determination of the right is the date of the suit ; and as the prior mortgagee has released the 'other estates' there are really no two 'securities' so as to attract S. 81 : Unreported case in Madras S. A. No. 1030 of 1937.[9]

7. These grounds may be examined seriatim.

A. Whatever may be the state of the English law on the point, it cannot be said that the Indian law confers any such absolute right on the prior mortgagee. For one thing, there is no provision in the Indian law conferring such a positive right. Secondly, even if such a right existed, it is controlled by another right conferred under S. 81, viz. the right of 'marshalling the securities.' Such a right of marshalling is always available and can be taken away only where prejudice is caused to the mortgagee. Thirdly, the Court has got an undoubted right, under O. 34, R. 4, Civil P. C., of settling the order in which the hypotheca may be sold to satisfy the claim of the prior mortgagee : *see* 3 Pat 522[5] at p. 533 where the learned Judge speaks of that statement of the law as the accepted view; *see also* 15 C W N 800.[10]

B. It is submitted that it is not correct to state that the mortgagee will be prejudiced even when he deliberately relinquishes his lien over a portion of the hypotheca. No question of prejudice can possibly arise, unless it is caused by any act which is beyond the control of the prior mortgagee. Ex hypothesi, the prior mortgagee relinquishes his lien only out of his own volition and it is scarcely fair for him to complain of any 'prejudice', so as to exclude the statutory right conferred on the puisne mortgagee of marshalling the securities. Such a construction on the word 'prejudice' in S. 81 will, it is submitted, make the Section entirely otiose and innocuous. It is a settled principle of construction that you cannot (except as a very last resort) (*cf*. Mulla, T. P. Act, at p. 445, commenting on 51 Mad 648[1]) place a construction on a statutory provision which will have the effect of making it either absurd or otiose. There appears to be no such overriding necessity. It is submitted therefore that to accede to the argument that even in cases where the 'other estate' becomes unavailable to the prior mortgagee by his own act, he can complain of prejudice, will be to whittle away, without any justification whatsoever, a very valuable privilege conferred on the puisne mortgagee by the Legislature.

C. As regards this point, it is doubtful any reference to the English law is at all permissible to construe an Indian statute, *vide* observations of the Judicial Committee in 7 Pat 221[11] where such a practice is deprecated, but assuming that a reference is permissible, it is submitted that it by no means follows that the effect of the

6. (1885) 55 L J Ch 343=30 Ch D 192=53 L T 737.
7. Perumal Pillai v. Raman Chettiar, (1918) 5 A I R Mad 1030=42 I C 352=40 Mad 968=33 M L J 211 (F B).
8. Subbiah Naidu v. Ram Sabad, (1936) 23 A I R Rang 266=163 I C 444=14 Rang 193.
9. In re Muthammal, *Since reported in* (1938) 25 A I R Mad 503=(1938) 1 M L J 310.
10. Mir Eusuff Ali Haji v. Panchanan Chatterjee, (1900) 15 C W N 800=6 I C 842 = 11 C L J 639.
11. Mt. Ramanandi Kuer v. Mt. Kalawati Kuer, (1928) 15 A I R P C 2 = 107 I C 14 = 7 Pat 221=55 I A 18 (P C).

English law is what it is suggested to be in the Madras case cited *supra*. There is no reference by the learned Judges in 51 Mad 648[1] to any English case where the identical point arose for decision and was decided against the puisne mortgagee. The leading cases on the subject, (1742) 2 Atk 444[12] and (1802) 8 Ves 382=7 R R 86,[13] on the contrary lay down the principle of S. 81, T. P. Act, almost in identical terms. In order to do equity, the "double creditor" is first obliged to have recourse against the "other estate", i. e. what is not mortgaged to the junior creditor. It seems to be well settled in England that where only one of the two estates is the subject of a later encumbrance, the puisne mortgagee has, save in an action for foreclosure, a well established right to have the securities marshalled (see Ghose on Mortgages, Vol. 1, p. 362, citing Ll & G 252[14] & comments thereon). It is only in actions for foreclosure that the right of marshalling is not available, but as Lord St. Leonards points out in actions for sale, the right is always available and is enforced. The practice in Ireland also appears to be the same. There is only one other case where marshalling is not available in England, and that is where both the estates are subject to puisne mortgages in favour of two different persons. In such a case it is manifest that the exercise of the right of marshalling by either of the puisne mortgagees will undoubtedly create hardship to the other junior encumbrancer. It is on that ground that the right is denied in such cases. The Indian law also is the same. S. 81 saves the rights of persons 'who have acquired rights for valuable consideration': *cf.* (1893) 2 Ch 54;[15] (1842) 1 Y & C C C 401;[16] (1843) 2 Y & C C C 377;[17] (1855) 20 Beav 614[18] and 61 M L J 512.[19] The passage extracted by Wallace J. in 51 Mad 648[1] from Kay L. J.'s judgment, "the right is an equity which is not enforced against the third person, that is, against anyone except the mortgagor and his legal representatives" should be understood as referring only to cases where both the estates have been mortgaged, after the first mortgage, to two different persons; this is certainly, as Stone J. of Madras points out in 61 M L J 512,[19] a case of rateable apportionment.

D. It is submitted that this ground, with respect, proceeds on a misapprehension of the passage occurring in *Flint* v. *Howard*[15] referred to *supra*.

E. This ground also is, with respect, untenable. S. 56 of the Act is, in terms differently worded from S. 81. Under S. 56, the right is only as against the 'seller'. The case in 51 Mad 648[1] was clearly within the principle of S. 56; the decision therein can have no possible application to cases under S. 81. It is interesting to note that S. 56 has now been amended in 1929, so as to bring it in conformity with S. 81. If it is permissible to refer to the Statement of Objects and Reasons, it will be found that the Section was amended in order to liberalize it and to bring it in conformity with S. 81, by deleting words containing an unjustifiable limitation.

F. The case in 40 Mad 968[7] can be distinguished on the ground already stated. (*cf.* 61 Cal 894.[20]) The other case in 14 Rang 198[8] presents more difficulty. It is no doubt true that S. 60, as amended, prohibits the puisne mortgagee from redeeming on payment of proportionate sum, except the solitary case mentioned therein. But, at the same time, it must be remembered that S. 81 confers a right on the mortgagee to exercise a right of marshalling. To read S. 60 in the manner in which it has been construed in 14 Rang 198[8] will be entirely to deprive the puisne mortgagee of a right which in distinct terms is conferred on him by S. 81. It is submitted that the prohibition in S. 60 is directed only in cases where there is another portion of the hypotheca still remaining unredeemed. In the case postulated in this note, the 'other estate' has been released and is entirely out of the picture. In such a case therefore the prohibition would seem to have no force. Looked at from that point of view, the objection based on S. 60, though at first sight it appears to be insuperable, becomes much attenuated if it does not lose all its force. Such a construction has also the

12. Lanoy v. Atholl, (1742) 2 Atk 444=26 E R 668.
13. Aldrich v. Cooper, (1802) 8 Ves 382=7 R R 86.
14. Avetall v. Wade, Ll & G 252.
15. Flint v. Howard, (1893) 2 Ch 54=62 L J Ch 804=2 R 386=68 L T 390.
16. Barnes v. Racster, (1842) 1 Y & C C C 401=11 L J Ch 228=6 Jour 595.
17. Bugden v. Bignold, (1843) 2 Y & C C C 377.
18. Gibson v. Seagrim, (1855) 20 Beav 614=24 L J Ch 782.
19. Official Assignee of Madras v. Byramshaw, (1932) 19 A I R Mad 196=135 I C 316=61 M L J 512.
20. Pran Ballav Saha v. Bhagban Chandra, (1934) 21 A I R Cal 775=152 I C 429=61 Cal 894=59 C L J 473=38 C W N 833.

merit of harmonizing these apparently irreconcilable provisions, Ss. 60 and 81.

G. With respect to this ground it is submitted that the argument is, if one may say so, ingenious and perhaps even attractive but is hardly convincing. It is submitted with respect that the material date is only the date on which the junior lien is created. It is no doubt true that a prior mortgagee cannot be affected in any way by anything done to the estate by the mortgagor subsequently. At the same time it cannot be over-emphasized that, that right of the prior mortgagee is undoubtedly controlled by and subjected to a right of marshalling. The Court can never countenance any act of a citizen, which will have the effect of setting at naught a statutory provision. Any attempt on the part of the prior mortgagee to get over S. 81 by advancing such an argument should be vigorously and strongly negatived. It may be that in the case postulated, there is strictly no occasion to 'marshal;' that does not however mean that S. 81 is entirely excluded. The Court is not thereby entitled to make a decree in favour of the plaintiff for the entire claim. The virtual effect of applying the doctrine of marshalling in favour of the junior mortgagee is to throw on his share of the hypotheca only that portion of the prior mortgagee's claim which still remains unsatisfied after the sale of the 'other estate.' Although, strictly S. 81 may not apply, the Court is not entitled on that account to deprive the junior mortgagee of the benefit that an application of Section confers on him. The duty of the Court in such cases is clear; it should proceed at once to apportion the value of the different estates mortgaged to the prior mortgagee and to make a decree in the plaintiff's favour only for such a sum as would be properly payable out of the property mortgaged to the defendant. Although the Court, in the circumstances cannot directly apply S. 81, it must undoubtedly grant that relief which the puisne mortgagee would be entitled to, as a result of enforcing the right of marshalling which he could have got but for the plaintiff's wrongful act. The Court, as a Court of equity, should certainly do equity; in so doing, it does not contravene the statute in any sense but only carries out the intention of the Legislature so clearly manifested in S. 81.

8. It will thus be seen that none of the grounds taken for the view that S. 81 cannot apply where the prior mortgagee releases his claim over a portion of the hypotheca is sufficient either singly or cumulatively to support the conclusion suggested.

9. The contrary—A I R 1935 Rang 139[3] and 34 All 606[4]—view is based on what appears to be, with respect, the more logical and a common sense view of S. 81, namely that it cannot be said in such cases that any prejudice of whatever kind is caused to the prior mortgagee. As stated above, if any prejudice at all arises, it is a prejudice which certainly cannot in any way operate to the detriment of the junior mortgagee. The decision in 34 All 606,[4] if one may say so, is very instructive and contains an elaborate discussion of the earlier authorities on the point.

10. Reference may now be made to an important observation of Fry L. J. in (1882) 21 Ch D 685,[21] where the learned Judge is reported to have observed at page 714 :

> If *A* having a lien on *X*, *Y* and *Z*, releases the lien over *X*, knowing others are interested in *Y* and *Z*, he could not afterwards insist on a lien, because he would be increasing the burden on *Y* and *Z*.

Cf. A I R 1930 Pat 442[22] at p. 444; 44 Bom 223;[23] Jones on Mortgages para. 723, Fisher on Mortgages 152; 66 Am. St. Rep. 87.[24] This reminds one of an important qualification which though not mentioned in terms in S. 81, T. P. Act, will appear to be a necessary qualification of the right of marshalling. The right of marshalling cannot be allowed to be exercised where the prior mortgagee has no real knowledge of the later lien. In such cases it appears to be manifest that to allow marshalling would be undoubtedly to cause prejudice to the prior mortgagee in terms of S. 81. It is the settled law that the mortgagee can release his lien on any portion of the hypotheca before any later encumbrance or transfer of the hypotheca is made by the mortgagor, (*see* 11 C L J 639[10]) from which is apprehended that a release by the mortgagee who had really no knowledge of the later lien, must also stand on the same footing.

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21. Kettlewell v. Watson, (1882) 21 Ch D 685=51 L J Ch 281=46 L T 83=30 W R 402.
22. Debi Prasad v. Kusum Kumari, (1930) 17 A I R Pat 442=128 I C 133=10 Pat 63=13 P L T 205.
23. Budhmal Kevalchand v. Rama Yesu Sangle, (1920) 7 A I R Bom 306=55 I C 327=44 Bom 223=22 Bom L R 68.
24. Brooks v. Benham, 66 Am. St. Rep. 87.

11. Reference may lastly be made to the decisions in 44 Bom 223[23] and 33 Cal 613,[25] where the learned Judges have held that where the prior mortgagee has lost his rights over a portion of the hypotheca by his laches, for example, bar of limitation, his suit can be decreed only for a proportionate share of his claim. The same principle, it is submitted, would apply to cases where the prior mortgagee released his lien on any portion of the hypotheca.

12. The last point that may be discussed is, what is the form of the relief to be granted in such cases. In some early cases, it was held that the Court should summarily dismiss the suit on the ground, relying on S. 85, T. P. Act, (O. 34, R. 1, Civil P. C.), namely that the necessary parties have not been impleaded; but later cases have adopted a more just attitude. The suit need not be dismissed, but the plaintiff may nevertheless be given a decree for a proportionate share of the amount due to him : *see* 30 Cal 755,[26] 33 Cal 613[25] and A I R 1931 All 625.[27]

13. The conclusions may be summarized as follows :

(i) A prior mortgagee has no absolute right to elect, out of which fund, he will satisfy his claim; the right is controlled by S. 81. (ii) S. 81 confers a positive right on the puisne mortgagee to marshall the securities; a right which attaches so soon as the mortgage is created, 3 Pat 522[5] at page 531, and cannot be affected or whittled away except on the one and the only ground mentioned in the Section; not a mere equity as suggested in 54 Mad 59[28] at p. 61. (iii) Where the prior mortgagee releases his lien over any portion of the hypotheca, he cannot on that account complain of any prejudice so as to exclude the operation of S. 81. (iv) Even if the person interested in the property released is not made a party to the suit, the suit cannot be dismissed on that ground. (v) The proper course to be adopted in such cases by the Court is to make a decree in favour of the plaintiff only for a proportionate sum, applying herein the principle of contribution enacted in S. 82 of the Act. (vi) Such a course will have the very desirable effect of avoiding multiplicity of actions : *cf.* Forms in Appendix G of the Civil P. C.

25. Imam Ali v. Baij Nath Ram Sahu, (1906) 33 Cal 613=3 C L J 576=10 C W N 551 (P C).

26. Hari Kishen Bhagat v. Veliat Hossein, (1903) 30 Cal 755=7 C W N 723.

27. Murli Prasad Awasthi v. Sheo Dat Prasad, (1931) 18 A I R All 625=1931 A L J 349.

28. Unnamalai Ammal v. Gopalswami Chetty, (1931) 18 A I R Mad 199=129 I C 655=54 Mad 59=60 M L J 69.

EXTRACTS FROM CONTEMPORARIES.

A Restaurant Meal.

On Friday of last week, during the hearing before Hilbery J. and a common jury of an action in which a man and his wife sought to recover from a restaurant keeper damages for alleged breach of warranty, counsel for the third party said to have supplied the questionable food to the restaurant, submitted that there could be no case to go to the jury on behalf of the wife because the action was in contract and the meal was ordered and paid for by the husband. There was no evidence of negligence. Hilbery J. when dealing with the point raised, said that it had not been fully argued, but as the matter stood, his view was that, where two or more persons went into a restaurant to eat a meal, the restaurant keeper provided for each individual the food he or she asked for and each undertook to pay for that food. The fact that, by a private arrangement, one of the customers was host did not affect the position. Certainly, a customer might telephone and order a meal for himself and so many friends, and the contract might in that case be deemed to have been entered into with him. His (his Lordship's) decision did not apply to such a case, but solely to one arising out of particular facts. In the present case he thought there was a contract with the wife as well as with the husband. The trial then proceeded on the facts.

Facts and Circumstances

Naturally as a well-known text-book has it, "the original parties to a contract must be persons ascertained at the time when the contract is made," but the ascertainer in the absence of any express statements, may have to depend on facts and circumstances to justify his state of mind. When a father in the Christmas "hols" enters a restaurant with two or more small boys, he is readily ascertained to be the person

who will have to pay the whole of the bill. Doleful amazement would assuredly follow any suggestion that Christmas tips should be commandeered in order to settle matters. So when a man takes a lady out to dinner, the person who will have to pay is often indicated with equal certainty, although, admittedly, young men and maidens now-a-days often arrange to "go fifty-fifty" when on pleasure bent. One recalls a scene in a play at the Gaiety in which diners are seated at small tables in the grounds of a continental restaurant. "Teddy" Paine is seated with one lady, and when the waiter brings the bill Paine nonchalantly refers him to his companion. "Does the lady pay?" asks the waiter in astonishment. "*Of course* the lady pays!" the little man replies. In the circumstances of such a scene, strong accordant evidence of the manners and customs of the class concerned would be required to render the lady liable for the whole or any part of the bill.

—*The Law Times, May 14, 1938.*

Reviews

Hindu Women's Rights to Property Act *by* RASHINDRA NATH SARKAR, M.A., B.L., Published by S. C. Sarkar & Sons, Ltd., Law Publishers and Book-sellers, 1-1-1C, College Square, Calcutta: Pages 53 Price Rupee 1.

Besides giving short critical notes to the Sections, the author has pointed out certain anomalies that still exist after the passing of this Act. Thus this booklet will be of use to lawyers and legislators.

History of the Government Law College, Bombay, 1855-1935, compiled *by* RAGHUNATH PARASHURAM KARWE, Registrar, Government Law College, Bombay. Pages 58.

We acknowledge with pleasure the receipt of this book. Mr. Karwe with his usual industry and thoroughness has detailed the growth of this institution from 1855 to 1935. While on the one hand the book affords interesting reading, on the other it serves as a record of all materials pertaining to this institution since its establishment in 1855.

The Law of the Indian Constitution *by* M. RAMASWAMY, B.A., B.L., Advocate, Bangalore, Published by Longmans, Green & Co. Ltd., 53, Nicol Road, Bombay: Pages 450. Price 21s. net.

In this book, the author has sought to present a legal interpretation of the Government of India Act of 1935. In order to enable readers to appreciate properly the nature of the changes introduced by the Act of 1935, the author has sketched the constitutional history of British rule in India through the Montagu-Chelmsford Reforms upto the Act of 1935 and has also clearly explained the position of the Indian States. The exposition of the Act of 1935, as Prof. Keith says in his Foreword to the book, "is full and clear, neither ignoring real difficulties nor raising problems unnecessarily by overrefinement." The author has pointed out most of the defects in the Act from the standpoint that the object of the constitution must be for the furtherance of national life so as to enable India to attain her goal of Dominion Status. For the correct appreciation of the issues involved, the author has referred to cases decided by the highest Courts in parallel circumstances under the constitutions of the Dominion of Canada, Australia and the United States of America. In short, the book is bound to be popular as an authoritative book on the law of Indian Constitution. The printing and get up are good.

Lectures on Company Law (Third Edition) *by* SHANTILAL M. SHAH, Barrister-at-law, Bombay. Published by The Popular Book Depot., Book-sellers and Publishers, Grant Road, Bombay. Pages 425. Price Rs. 4.

The fact that within a year of the previous edition, another edition had to be taken out shows the popularity of the book. In the third edition under review, the lectures have been thoroughly revised and case-law has been brought up to April 1938. The new features of this edition are that the text of the Companies Act as amended up to February 1938 has been printed in a clear form and the Schedules to the Act which were omitted in the previous edition have been usefully added. We are sure the book will continue to be more and more popular with the student of law, businessman and lawyer.

The Madras Agriculturists Relief Act *by* B. VAIKUNTA BALIGA, B.A. B.L., Pleader, Mangalore. Published by K. Bhoja Rao & Co., Law Publishers, Car Street, Mangalore. About 85 pages. Price As. 12.

This booklet is yet another addition to the several other books on this important piece of legislation. Besides the Act, the author has in his "Hints on the study of the Act" given at the beginning, exhaustively discussed the question of the ultra vires nature of the Act and also indicated some of the difficulties that are bound to be experienced in the actual administration of the Act. In this respect, this book appears to be better than several others published so far.

Commentaries on the Insurance Act (4 of 1938) *by* TARADAS DUTT, M.A., B.L., CALCUTTA. Published by S. C. Sarkar & Sons, Ltd., 1-1-1C, College Square, Calcutta. Pages 203. Price Rs. 3.

The Notes to the Sections are clear and exhaustive. The author has therein explained the changes brought about, and where the law has not been changed, he has referred to leading decisions. He has expressed his own considered opinion on some of the doubtful points. The book is bound to prove an indispensable practical guide for lawyers and insurance men.

Indian Insurance Act (4 of 1938) *by* SUSIL C. SEN, C. B. E., Advocate, Calcutta. Published by S. C. Sarkar of M. C. Sarkar & Sons Ltd., 15 College Square, Calcutta. Pages 144. Price Rs. 3.

The author has indicated in the Synopsis the main features of the new Act and has explained the changes that have been brought about in the law of insurance in this country. The Statement of Objects and Reasons and Notes on Clauses are also given. These will be found to be useful in understanding the provisions of the Act.

The Provincial Small Cause Courts Act (9 of 1887 as amended up to date, including the Government of India (Adaptation of Indian Laws) Orders (1937), (3rd Edition) *by* S. K. RAY CHOWDHURY, B.L., Advocate, Calcutta. Published by S. C. Sarkar and Sons, Ltd., Law Publishers and Book-sellers, 1-1-1C College Square, Calcutta. Pages 170. Price Rs.2-12.

This book supplies the need of an up-to-date edition of the Act. All the amendments have been incorporated. The history of the law relating to Small Cause Courts has been traced and set forth in the Introduction. In this edition the notes have been revised and re-written and case law has been brought up to end of June 1938. Government Notifications and High Court Circulars are given in the Appendix. The book is bound to be of great use to the Bench and the Bar.

The Notable Indian Trials *by* S. C. SARKAR. Published by S. C. Sarkar of M. C. Sarkar & Sons Ltd., 15, College Square, Calcutta. Pages 152, Price Rs. 2.

We welcome the enterprise of the author in bringing out a collection of some of the notable trials held in India. The collection of cases has been judicious and will satisfy the tastes of every one. Thus it contains the trial of Nirmal Kanta Ray—one of the most remarkable political murder trials ever held in India—a trial packed with sensation from beginning to end; the celebrated Plague Bacilli Case or Pakur Murder case—a case bristling with problems of legal, medico-legal and psychological interests; the Fulham-Clark Murder Case—a unique story of criminal passion, base intrigue and diabolical murder; two Contempt of Court Cases, viz. case against Surendranath Banerjee and the recent Patrika case; the Meerut Conspiracy case—the story of the sensational Communist Trial in India; the story of the lust of the Raja of Aul—a story with all its grimness and bestiality that is shocking to all; the Alipore Bomb Case; the pathetic Sati Case and last but not least interesting the Kiroo Torture case—perhaps one of the worst examples of police torture upon suspects during investigation of crimes.

The book is written in an elegant style, with important extracts from judgments and arguments of counsel. The book, we are sure, will be read with great interest by every one, and we await with eagerness the publication of the second volume which the author proposes to bring out.

MR. GEORGE HECTOR THOMAS, BAR-AT-LAW

ACTING CHIEF JUDGE, OUDH CHIEF COURT, LUCKNOW

George Hector Thomas, Barrister at Law, was born on 23rd June 1884. Early in life he went to England and returned as a Barrister-at-Law. He started practice

in 1905 at Lucknow in the old Court of the Judicial Commissioner of Oudh. Very soon he made a mark in the profession. He was selected to be the first Government Advocate when the Chief Court of Oudh was established in the year 1925. As a Government Advocate, he was very just to the accused and gave satisfaction to the members of the Bar who appeared against him. He was appointed Puisne Judge of the Chief Court of Oudh in the year 1934 and as such he tried many original taluqa cases and has shown great legal acumen in his judgments.

He was appointed Acting Chief Judge in November 1937 and again in July 1938.

He is connected with most of the important educational institutions of Lucknow.

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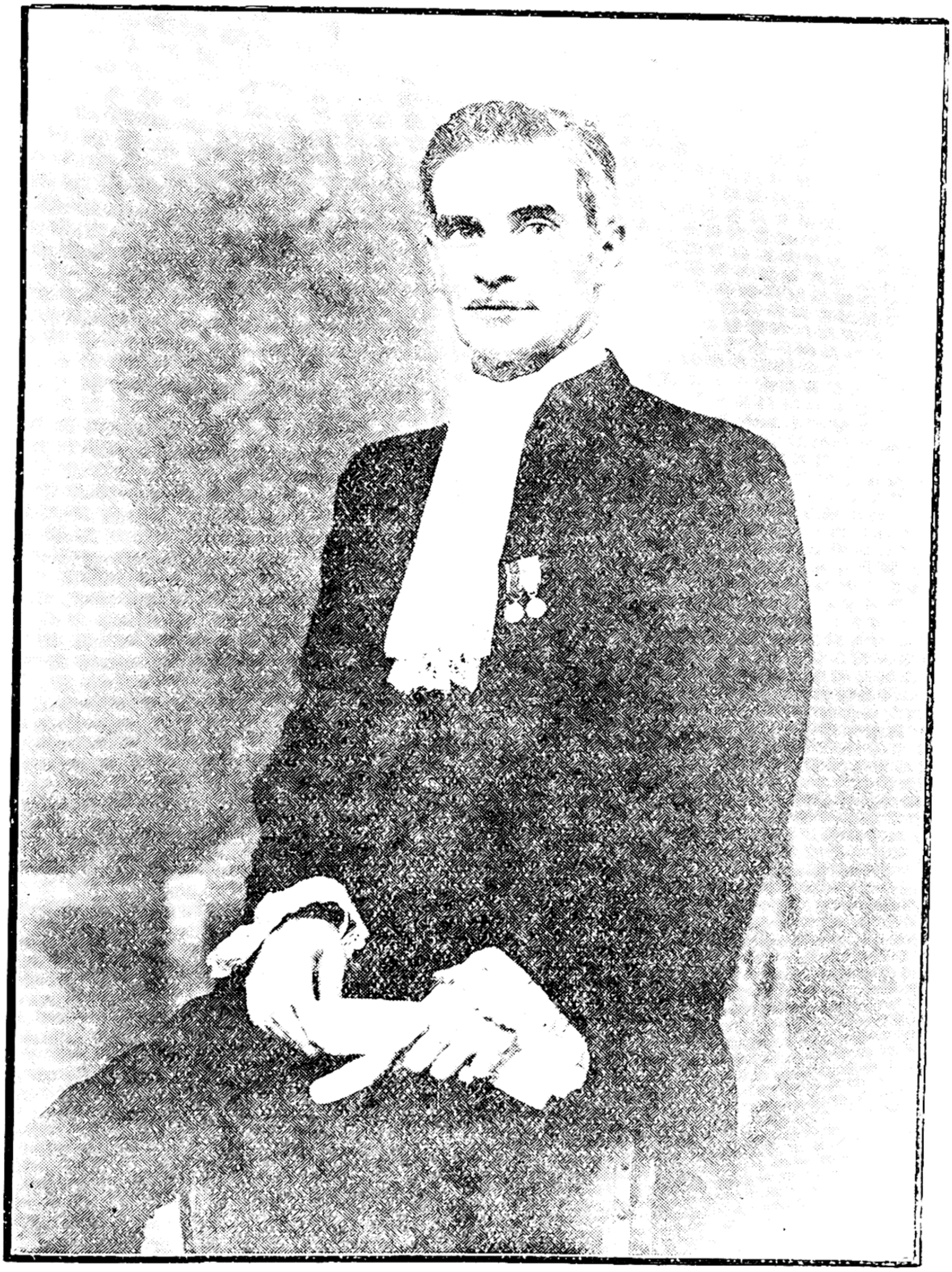
MR. ARCHBALD DE BURGE HAMILTON, I. C. S.

JUDGE, CHIEF COURT OF OUDH AT LUCKNOW

Born on 4th July 1886. Educated at King's Canterbury and Corpus Christian College, London.

Appointed in the Civil Service after the examination in 1909. Joined Service on 24th October 1910.



Was posted as Assistant Commissioner and Collector at Allahabad, Agra, Sultanpur, Lucknow, Unao, Garhwal, Mirzapur, Benares, Etah and Aligarh. Was Sessions and Subordinate Judge at Shahjahanpur, Meerut and Lucknow. District and Sessions Judge at Allahabad. Legal Remembrancer for Government of U. P. Was District and Sessions Judge at Kumaun and Cawnpore.

Tried the famous Kakori Conspiracy Case. This was a trial under Section 121, Indian Penal Code.

Was appointed Puisne Judge of the High Court of Judicature at Allahabad; has been Judge of the Chief Court of Oudh for about 1 year now.

STATEMENTS BY ACCUSED PERSONS

with reference to

Section 27, Evidence Act, and Section 162, Cr. P. C.

by MANTHA RAMAMURTI, M.A., B.L., VAKIL, *Vizagapatam.*

Statements made by accused persons play an important part in the conduct of trials. In each case we have to see when, in what circumstances, to what extent, and what nature of statements are admissible in evidence. These become all the more important when there is paucity of other evidence and when the conviction has to be based on the alleged statements by accused persons. It is a matter of common experience that confessions or statements of an incriminating nature are frequently alleged to have been made by accused persons in several cases. But, it was observed in several cases that "it is a notorious fact that confessions are frequently extorted in this country." It is on account of this distrust in them that the Legislature has thrown protection round accused persons by making suitable provisions under Ss. 24, 25 and 26, Evidence Act, and S. 162, Criminal P. C. S. 164, Criminal P. C., provides for the few cases of true confessions, and to ensure about their truth and voluntary character, the Section provides an elaborate and strict procedure.

It may be of interest to note that the best evidence, namely the documentary evidence, is shut out under S. 162, Criminal P. C., hereinafter referred to as S. 162. Among other reasons, it is for the very reason that it forms the best evidence for the prosecution to the greatest prejudice of the accused that it is prohibited. Now under S. 162 all statements of "any person" made before a police officer (1) as a general rule, cannot be used as evidence in any inquiry or trial in respect of any offence under investigation; or (2) "such writings" cannot be made use of to corroborate the statement of a prosecution witness; or (3) "such writings" cannot be used to corroborate the statement of the defence; or (4) to impeach the credit of a witness for the defence. "Such writings" far from being useful for the prosecution for any purpose are, on the other hand, useful for the accused to contradict the statement of a prosecution witness under S. 145, Evidence Act, and the manner in which this is to be done is indicated in the Section.

A subtle distinction was sought to be made in 35 Mad 247,[1] 36 Cal 281[2] and 39 Bom 58[3] between the writing and the statement contained in the writing. It was held that the record containing the statement could not be used as evidence against the accused but the statements could be orally proved against him. In 32 Bom 111[3a] it was pointed out that this distinction was one of form rather than of substance. This later view was approved by the Legislature in the Amending Act 18 of 1923. Even after the amendment in 1923, the same distinction was drawn in 48 Mad 640[4] and 5 Lah 324,[5] but these were later upset and disapproved in 55 M L J 351[6] and 7 Lah 264.[7] These later decisions are in line with the decisions in the other High Courts reported in A I R 1924 Bom 510,[8] A I R 1926 Cal 550,[9] A I R 1926 Cal 793[10] and 4 Rang 72[11] with the result that there is now a unanimity of opinion and the statement and the record of such statement are both inadmissible in evidence under S. 162.

1. Emperor v. Nilkantha, (1912) 35 Mad 247=14 I C 849=22 M L J 490=1912 M W N 207.
2. Fanindra Nath v. Emperor, (1909) 36 Cal 281 =1 I C 970=9 C L J 199=13 C W N 197.
3. Emperor v. Hanmareddi Rama Reddi, (1914) 1 A I R Bom 263=26 I C 138=15 Cr L J 690 =39 Bom 58=16 Bom L R 603.

3a. Emperor v. Narayan Raghunath Patki, (1908) 32 Bom 311=9 Bom L R 789=6 Cr L J 164.

4. Venkatasubbiah v. Emperor, (1925) 12 A I R Mad 579 = 85 I C 209 = 26 Cr L J 721 = 48 Mad 640=48 M L J 195.
5. Mam Chand v. Emperor, (1924) 11 A I R Lah 609=82 I C 129=25 Cr L J 1201=5 Lah 324.
6. Thimmappa v. Krishnayya, (1928) 15 A I R Mad 1028=112 I C 682=29 Cr L J 1098 = 51 Mad 967=55 M L J 351 (F B).
7. Bahadur Singh v. Emperor, (1926) 13 A I R Lah 367=95 I C 467=27 Cr L J 803=7 Lah 264=27 P L R 379.
8. Emperor v. Vithu Balu, (1924) 11 A I R Bom 510=83 I C 1007 = 26 Cr L J 223 = 26 Bom L R 965.
9. Bhagirathi v. Emperor, (1926) 13 A I R Cal 550=92 I C 174=27 Cr L J 222=30 C W N 142.
10. Gahur Howlder v. Emperor, (1926) 13 A I R Cal 793 = 94 I C 593 = 27 Cr L J 641 = 30 C W N 503.
11. Emperor v. Maung Tha Din, (1926) 13 A I R Rang 116 = 96 I C 145 = 27 Cr L J 881 = 4 Rang 72 (F B).

But there is still a keen conflict on the question as to whether the statements referred to in S. 162 (1) relate only to statements made by witnesses or whether they include statements of accused persons. In 55 All 463,[12] 54 Cal 237,[13] 5 Pat 63,[14] 7 Lah 84,[15] A I R 1934 Lah 695,[16] A I R 1933 Nag 136[17] and 4 Rang 72,[11] hereinafter called the Allahabad group of cases, the first view is favoured and the main ground for their decisions is that S. 27, Evidence Act, hereinafter referred to as Sec. 27, would be otherwise virtually repealed thereby. But A I R 1932 Mad 391,[18] A I R 1935 Mad 479,[19] 55 Bom 435,[20] A I R 1937 Oudh 331,[21] hereinafter called the Madras group of cases, hold that the statements of the accused persons to the police are also attracted by the provisions of the Section subject to the provisions of S. 27.

Messrs. Chitaley and Annajirao in their learned Commentary on Criminal Procedure Code support the first view on a different ground, namely that S. 2, Evidence Act, is a "specific provision to the contrary" within the meaning of Sec. 1, sub-s. (2), Criminal P. C., and that for this reason the Code prevails in cases of conflict between the two and that if S. 162 should be construed as applying to accused persons, it will clearly have the effect of superseding S. 27. They suggest that the only escape out of this difficulty is the construing of the Section as not including accused persons.

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12. Emperor v. Faijidar, (1933) 20 A I R All 440 =1930 Cr C 746 = 144 I C 1021 = 34 Cr L J 875=55 All 463=1933 A L J 1518.
13. Azamuddy v. Emperor, (1927) 14 A I R Cal 17 =99 I C 227=28 Cr L J 99=54 Cal 237=44 C L J 253.
14. Jagwa Dhanuk v. Emperor, (1926) 13 A I R Pat 232=93 I C 884=27 Cr L J 484 = 5 Pat 63=7 P L T 396.
15. Rannun v. Emperor, (1926) 13 A I R Lah 88 =94 I C 901=27 Cr L J 709=7 Lah 84=27 P L R 583.
16. Mahamud v. Emperor, (1934) 21 A I R Lah 695=1934 Cr C 1009=155 I C 260=36 Cr L J 697=35 P L R 738.
17. Rego v. Emperor, (1933) 20 A I R Nag 136 = 1933 Cr C 610=143 I C 17=34 Cr L J 505 = 29 N L R 251.
18. Syamo v. Emperor, (1932) 19 A I R Mad 391 =1932 Cr C 355=137 I C 9=33 Cr L J 418= 55 Mad 903=62 M L J 742 (F B).
19. In re Krishna Iyer, (1935) 22 A I R Mad 479 =1935 Cr C 742=157 I C 297=36 Cr L J 1107.
20. Issuf Mahamod v. Emperor, (1931) 18 A I R Bom 311=1931 Cr C 567=133 I C 748 = 32 Cr L J 1077=55 Bom 435=33 Bom L R 305.
21. Kanhailal v. Emperor, (1937) 24 A I R Oudh 331=168 I C 58=1937 O W N 505.

It is submitted that the Allahabad group of cases and the two learned Commentators approach the question indirectly with reference to the effect of the answer on the provisions of S. 27. To discuss the question it would be better first of all to state the propositions in respect of which there is absolute unanimity of opinion. A confession made to a police officer is inadmissible in evidence under S. 25, Evidence Act. A confession made to a third party is inadmissible under S. 26, Evidence Act, if it is made while the accused person is in the custody of a police officer otherwise than in the immediate presence of a Magistrate. Where statements made by the accused persons lead to discovery of objects, then so much of such information, whether it amounts to a confession or not, as relates distinctly to the facts thereby discovered may be proved under S. 27. It is equally undisputed that S. 162, Criminal P. C., by its plain and unambiguous language, is wide enough to include accused's statements and that the said Section is intended to give greatest protection to the accused without corresponding rights to the prosecution in some respects.

In these circumstances we have to see whether statements of accused persons as are not hit by Ss. 25 and 26 and as do not come within the exception contained in S. 27, hereinafter referred to as "such statements", fall within the scope of S. 162. Considering the provisions of the Evidence Act alone, "such statements" are clearly admissible. But by reason of the saving clause in S. 2, Evidence Act, they become inadmissible if they are hit by S. 162. The clear and unambiguous wording of the Section and the words "any person" are wide enough to include accused persons. Where the language of the Section is clear, extraneous considerations need not weigh with the Court. If regard is had for such considerations we may say that far greater hardship and prejudice would result to the accused if the Section is interpreted as not including accused persons, as when they are alleged to have made statements leading to discovery while not in police custody, and also as when they do not amount to confessions under S. 25, Evidence Act. No doubt in a few instances as in 55 All 463,[12] 54 Cal 237,[13] etc. "such statements" may be favourable to the accused. But in such few cases the difficulty can be got over by the accused producing the necessary evidence. In the generality of cases they are

prejudicial to the accused. They might generally make incriminating statements unthinkingly and out of excess of fear. Again, considerations which weighed with the Legislature in excluding statements of witnesses, namely of their being made "in the midst of a crowd and confusion subject to frequent interruptions and suggestions from by-standers", etc. equally apply to accused's statements.

Again the Section reads "no statement by any person . . ." Proviso 1 reads "provided that, when any witness is called . . ." If the words "any person" were intended by the Legislature to mean only a witness, then Proviso 1 would have been worded as "provided that when any such person is called". The juxtaposition of "any person" and "any witness" is significant.

For a consideration of this question regard must be had to Part 1 of S. 162, namely "No statement made by any person . . . be signed by the person making it". The language of this part of the Section in 1898 Code is exactly the same as in 1882 Code but for the omission of the words "other than a dying declaration" and the substitution of sub-s. (2) with which we are not concerned now. The Code of 1882 contained the Proviso 1 "Nothing in this Section shall be deemed to affect the provisions of S. 27, Evidence Act," thus leading to an irresistible conclusion that the words "any person" included the accused, as otherwise there is no need for the clause. But this saving clause was omitted in the later Code. Whatever might be the effect of this omission on S. 27 itself, the use of the same language leads to the conclusion that the words "any person" include the accused, as observed by Sundaram Chetty J. in 62 M L J 742.[18]

For all these reasons it is submitted, S. 162 must be construed as covering "such statements" of the accused. What then is the effect of S. 162 on S. 27 if the former is construed as applying to accused persons? With the saving clause relating to S. 27 in S. 162 in the Code of 1882, there was no difficulty in holding that S. 27 prevailed in cases of conflict between the two Sections. Even after the omission of this saving clause in the Code of 1898, there is no change in interpretation, i.e. statements covered by both the Sections are held to be admissible in evidence under S. 27 in spite of S. 162 to the contrary. This opinion is unanimous.

But this unanimity is arrived at in different ways in different cases. In the Allahabad group of cases the apparent conflict between the two sections is got over by construing S. 162 as not applying to accused persons. In the Madras group of cases full sway is allowed to S. 27 by holding that it is a special provision and that S. 162 is only a general provision and that a general provision does not derogate from a special provision. The question is which reasoning is preferable. We have seen above that S. 162 is applicable to statements by accused persons. If that reasoning is correct, the view expressed in the Madras group of cases has to be preferred. The truth of the facts that could be proved under S. 27 is guaranteed by the discovered fact or object, which safeguard is wholly wanting in the case of statements falling under S. 162. Certain special conditions must be strictly satisfied before S. 27 could come into operation which is not the case in the other. In other words, S. 27 is special and limited, whereas S. 162 is wide and general. According to S. 1 (2), Criminal P. C. :

> The Code extends to the whole of British India ; but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force . . . . .

The Evidence Act is a special law now in force and nothing contained in S. 162 shall affect that special law as there is no specific provision in S. 162 to the effect that it is to override the provisions of S. 27 to the contrary. Consequently by reason of S. 1 (2) of the Code, S. 162 is subject to the provisions of S. 27, Evidence Act. A clause to the effect that S. 27 is to prevail over the provisions of S. 162 is unnecessary in view of S. 1 (2) of the Code, as the only thing that can prevent the operation of S. 27 is a specific provision in S. 162 itself restricting the operation of S. 27 and this explains, it is submitted, the omission of the saving clause relating to S. 27 in the Code of 1898. This aspect of the case has not been discussed in any of the cases or by the learned Commentators. The answer to the question is that S. 27 controls not only Ss. 25 and 26, Evidence Act, but also S. 162, Criminal P. C.

The next question that falls for consideration is, how far is a statement of an accused person leading to discovery of facts admissible in evidence under S. 27? This is also a very important question and unfortunately here again there is an amount of divergence of judicial opinion.

The problem is whether that part that relates directly and distinctly to the fact or object thereby discovered alone is admissible, hereinafter called the first view, or whether the part of the statement which connects the thing discovered with the offence is also admissible along with the part that directly leads to the discovery, hereinafter called the second view. The preponderance of judicial opinion is undoubtedly in favour of the first view. Even by 1914, Sadasiva Iyer J. in 26 M L J 352[22] felt oppressed by weight of authority in favour of the first view, though he was personally inclined in favour of the other. The decisions reported in 11 Bom H C R 242;[23] (1937) M W N 881;[24] 12 Mad 153;[25] 6 All 509;[26] 14 Bom 260;[27] 56 Bom 172;[28] A I R 1934 Bom 233;[29] 10 Lah 283;[30] 11 Cal 635;[31] 45 Cal 557;[32] A I R 1930 Cal 291[33] and 10 Pat 153[34] are in favour of the first view. The decisions reported in 14 M L W 418;[35] 50 Mad 274;[36] 6 Pat 747[37] and 46 M L W 152[38] are in favour of the second view. On an analysis it will be observed that the Allahabad, Bombay, Calcutta and Lahore decisions are entirely in favour of the first view and that in Madras and Patna there is a keen conflict in view and that there is no Court in which the second view is entirely favoured. As the decisions are too many, it is sufficient to refer to a few of them.

In 46 M L W 152[38] the first part of the statement of the accused (it was too long to be quoted) was purely confessional and the second part led to the discovery of objects. The whole statement has been held to be admissible in evidence under S. 27. At page 169 the reason is given as:

> In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of the murder just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence aliunde and it can be made relevant by the statement of the accused himself. Suppose there is no evidence aliunde, what warrant is there for saying that the part of the statement of the accused that makes it relevant must be excluded because it amounts to a confession ?

In this case there was no evidence aliunde to connect the discovered objects with the offence and their Lordships had no doubt about the truth of the statement.

In A I R 1926 Mad 638,[36] the statement of the accused was: "the properties stolen from the mutt were buried by me and others in the Cauvery tank." The whole statement was held to be admissible. 6 Pat 747[37] follows the above A I R 1926 Mad 638.[36] The earliest case on the subject is 11 Bom H C R 242.[23] Therein West J. observes:

> The statement must have been such that that information constituted the information through which the discovery was made, in order to render the statement admissible. The other statements connected with one thus made evidence, and so mediately but not necessarily or directly connected with the facts discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against their unfair practice on the part of the police.

In 10 Lah 283[30] the statement of the accused was:

> I had removed the karas, and have pushed the body into the well, and *had pledged the karas with Alla Din* (the italics are mine).

Five out of seven learned Judges who constituted the Full Bench have held, in the leading judgment delivered by Sir Shadi Lal C. J. (now a member of the Judicial Committee of the Privy Council), that the statement that the accused had pledged

22. Manjunathaya v. Emperor, (1914) 1 A I R Mad 61=24 IC 845=15 CrLJ 533=26 MLJ 352.
23. Reg. v. Jora Hesji, (1874) 11 Bom H C R 242.
24. Kariyan v. Emperor, (1937) M W N 881.
25. Queen-Empress v. Commer Saheb, (1889) 12 Mad 153=2 Weir 738.
26. Queen-Empress v. Babu Lal, (1884) 6 All 509 =1884 A W N 229 (F B).
27. Queen-Empress v. Nana, (1890) 14 Bom 260 (F B).
28. Ganu Chendra v. Emperor, (1932) 19 A I R Bom 286=1932 Cr C 398=137 I C 174=33 Cr L J 396=56 Bom 172=34 Bom L R 303.
29. Emperor v. H. Z. Salve, (1934) 21 A I R Bom 233=1934 Cr C 886=151 I C 883=35 Cr L J 1444=36 Bom L R 384.
30. Sukhan v. Emperor, (1929) 16 A I R Lah 344 =115 I C 6=30 Cr L J 414=10 Lah 283=30 P L R 197 (F B).
31. Adu Sikdar v. Queen-Empress, (1885) 11 Cal 635.
32. Amiruddin Ahmed v. Emperor, (1918) 5 A I R Cal 88=44 I C 321=19 Cr L J 305=22 C W N 213=45 Cal 557=27 C L J 148.
33. Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhajoo Majhi, (1930) 17 A I R Cal 291=1930 Cr C 379=125 I C 733= =57 Cal 1062=34 C W N 106.
34. Sonaram Mahatom v. Emperor, (1931) 18 A I R Pat 145=1931 Cr C 385=131 I C 797 =32 Cr L J 792=10 Pat 153=12 P L T 481.
35. In re Nainamalai Konan, (1921) 8 A I R Mad 679=69 I C 377=14 M L W 418.
36. Sogiamuthu Padayachi v. Emperor, (1926) 13 A I R Mad 638=93 I C 42=27 Cr L J 394= 50 Mad 274.
37. Lalji Dusadh v. Emperor, (1928) 15 A I R Pat 162=106 I C 698=29 Cr L J 106=6 Pat 747.
38. Athappa Goundan v. Emperor, (1937) 24 A I R Mad 618=171 I C 245=38 Cr L J 1027=46 M L W 152=I L R (1937) Mad 695=(1937) 2 M L J 60 (F B).

with Alla Din the karas subsequently recovered from the latter—(i. e., the italicized portion) — is alone admissible under S. 27 but not the rest. It is held that S. 27 requires two conditions to be satisfied : (i) the information must be such as has caused the discovery of the fact, i. e. the fact must be the consequence and the information the cause of the discovery. (ii) The information must "relate distinctly" to the fact discovered, i. e. the information must be clearly connected with the fact.

In A I R 1934 Bom 233[29] the statement of the accused was :

the knife with which the throat was cut, was washed and *kept on a paincara of the mori in the kitchen* (the italics are mine).

Their Lordships held that the first part did not lead to the discovery of the knife and that it did not fall under the word "directly" in S. 27 and that the latter part "the knife was on a paincara of the mori in the kitchen"—(the italicized part)—alone is admissible.

In A I R 1930 Cal 291[33] the statement of the accused was that he had killed the deceased and thrown his body into the river and it contained information relating to the actual discovery of blood stains near the tree and the articles of clothing in the river. The purely confessional part (the first part) was held to be inadmissible in evidence and the latter part alone was admitted.

In 10 Pat 153,[34] the observations of Sir Shadi Lal C. J. in 10 Lah 283[30] and of West J. in 11 Bom H C R 242[23] were followed, but A I R 1930 Cal 291[33] was not followed to the full extent.

In (1937) M W N 881[24] it was held that where the fact discovered was that the grave in which the corpse of the deceased was interred was dug up with a spade produced by the accused, the only part of the information given by him which can be admitted was that relating strictly to the discovery of the spade with which the grave was dug and that it was not possible to admit any statement by him that he murdered the deceased.

So also in the other cases mentioned above, it will be seen that in each case the statement contains two parts: one part alone directly leading to discovery and the other a purely confessional statement which merely connects the discovered object with the crime. Now S. 27 reads :

> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Clearly the two conditions formulated by Sir Shadi Lal C. J. in 10 Lah 283[30] must be satisfied for the applicability of the Section. The confessional connecting part does not satisfy these conditions. The words "so much of such information . . . . . as relates distinctly to the fact thereby discovered" contemplate, it is submitted, the cutting up of the statement and receiving only that part that relates distinctly to the fact thereby discovered.

The origin of S. 27 also points to the same conclusion. Clearly S. 27 is a paraphrase of Taylor's Para. 902 (Edn. 11, page 614) :

> The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is therefore competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not, in such a case of confession improperly obtained, be competent to enquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false.

Moreover, I submit that the connecting confessional statement is no better than the statements which are scrupulously excluded under Ss. 25 and 26, Evidence Act, and S. 162, Criminal P. C., seeing that all the infirmities attached to statements falling under the latter Section are present in the connecting statements. Undoubtedly the statements falling under S. 162 are excluded as they "are recorded by police officers hurriedly in the middle of a crowd and confusion subject to frequent interruption and suggestions from by-standers". It is difficult to see how the purely confessional part, the truth of which cannot be tested by the discovered object, is in any way better than these statements. The investigating officers may be directed to take statements in the words of the accused but as observed by Sir Shadi Lal C. J. in 10 Lah 283[30] "it is not always possible to observe this salutary rule," obviously on account of the haste, confusion, etc. then existing. This is all the more dangerous where the investigating officer is inexperienced or where there is no other evidence aliunde. As observed by Graham J. in A I R 1930 Cal 291[33] :

If that portion of the statement or information which contains a confession of the commission of the crime were admitted, there would be a great temptation for the police to drag in statements of this nature.

In (1893) 2 Q B 12[39] at page 18 Cave J. observes :

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; the prisoner is not infrequently alleged to have been seized with a desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a Court of justice.

Again it is submitted that the extent of the admissibility of evidence under S. 27 cannot depend upon the extent of the availability of evidence aliunde. The gravity of the dangers attending the reception of such evidence varies inversely as the availability of evidence aliunde. Consequently it is not safe to admit such connecting confessional statements.

Again in a recent case, 71 M L J 476= 44 M L W 583,[40] their Lordships of the Privy Council have held that oral evidence of a pure confession made to a Magistrate under S. 164, Criminal P. C., is not admissible in evidence as the strict provisions of that Section are not thereby complied with. If the purely confessional portions of the statements are allowed to be deposed to by the investigating police officer it would, it is submitted, lead to the obvious anomaly that a police officer would be able to do what a Magistrate himself could not do. If a purely confessional part is allowed to go into evidence under the garb of S. 27, it would virtually amount to an abrogation of the elaborate and strict provisions of S. 164, Criminal P. C. This aspect of the case has not been considered in any case. This Privy Council case has not been referred to in the recent Madras case, A I R 1937 Mad 618.[38]

The admissions into evidence of statements, which do not distinctly lead to discovery but which only serve to connect the accused with the crime, would be a high open gateway to a ground which is declared unfit for treading by Ss. 24 to 26, Evidence Act, and S. 162, Criminal P. C. No doubt it cannot but be said that in some cases the part of the statement leading to discovery may become useless by the rejection of the connecting confessional statement. But such cases are rare. As the admission into evidence of such confessional connecting statements results in smashing the safeguards deliberately designed by the Legislature under Ss. 24, 25, 26, Evidence Act, and S. 162 and S. 164, Criminal P. C., and exposes innocent accused persons to the grave danger of being convicted, it is submitted that the first view is safe and preferable.

The next question is what is meant by 'fact' as used in S. 27. Under S. 3, Evidence Act, 'fact' as defined includes not merely the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. In 10 Lah 283[30] their Lordships have held that the word is used in the former sense under S. 27 and that the phrase "fact discovered" used by the Legislature refers to a material and not to a mental fact. In this respect also the Madras High Court has taken an extreme view. In A I R 1935 Mad 528[41] two out of the three learned Judges have held that the statement of the accused "I purchased the mattress from this shop and it was this woman (another witness) that carried the mattress" is admissible under S. 27 and that 'fact' as used in the Section need not be a material object alone. The decision is based on the ground that

> it was a confession that directly led to the police officer making the discovery of not merely a shopkeeper and a cooly woman but that one had sold a mattress to the accused and the other had carried it for him from the shop.

10 Lah 283[30] has been referred to and their Lordships observed that when the fact of pledge with Alla Din is treated as a fact discovered, the discovery of a shopkeeper, etc. would be discovery of fact. It is humbly submitted that a fact of the pledge with Alla Din is treated as a fact discovered, as a pledge with Alla Din amounts to a place of hiding and as the karas were discovered with him on such information. But the same thing cannot be said with reference to the discovery of the shopkeeper, etc. as they have not led to the dis-

39. R v. Thompson, (1893) 2 Q B 12=62 L J M C 93=5 R 392=69 L T 22=41 W R 525= 57 J P 312=17 Cox C C 641.

40. Nazir Ahmed v. Emperor, (1936) 23 A I R P C 253=1936 Cr C 752=163 I C 881=37 Cr L J 897=63 I A 372=17 Lah 629=71 M L J 476 =44 M L W 583 (P C).

41. Emperor v. Ramanuja Ayyangar, (1935) 22 A I R Mad 528=1935 Cr C 728=158 I C 764 =36 Cr L J 1442=58 Mad 642=68 M L J Sup 73 (F B).

covery of the mattress, seeing that it had been discovered previously.

The statement of the accused is a piece of evidence which serves to trace the mattress to the accused. Such statements are exactly hit by S. 162 as observed by Lakshmanarao J. in the same case. Following 10 Lah 283[30] his Lordship (Lakshmanarao J.) has also held that "fact" refers to a material object. Otherwise the dangers pointed above in connexion with the discussion about the admissibility of connecting confessional statements will be present in this case also.

We have seen above that a statement of the accused leading to discovery of a fact is made admissible on the ground that it can tell its own tale which affords a guarantee for the truth of the statement. It follows that such a statement is not admissible where the fact has been previously discovered by the police (A I R 1934 Lah 786[42]) or by some one else before the statement of the accused though not to the knowledge of the police (A I R 1934 Lah 314[43]) or when the object is in such a place as to be discovered by anyone without any special information given by the accused. The discovery of a witness to the crime or act of the accused, on his information, would not be a discovery of a fact within the meaning of the Section, 49 Cal 167[44] and (1934) M W N 601,[45] but the decision in A I R 1935 Mad 528[41] must be taken to be against this view.

In 11 Bom H C R 242[23] West J. observes that the Court must not under cover of S. 27 "allow discovery of ordinary articles like lathis, knives, sticks and clothes to be introduced and admit practically confessions to the police" and that the discovery ought to be of a fact which is directly connected with the crime apart from the statement. Again where there are several accused and it is not possible to say which of them gave the information leading to the discovery of facts, the whole evidence of joint discovery is inadmissible. But when the information is given by several accused one after the other, it is admissible as against the person who first gave the information. It has been held in several cases that "custody" under S. 27 does not mean that the accused must have been actually arrested. In the case of mere suspects who have not been formally charged with any offence or arrested under any Section of the Criminal Procedure Code, their presence with the police under some restraint amounts to "custody" which is contemplated by this Section.

The result of the above discussion is that evidence which is wholly insufficient to convict an accused person in some provinces is more than sufficient to convict and hang him in some other provinces. Such a result is undoubtedly very deplorable. As it is not possible, in the ordinary course of things, to secure an all binding Privy Council decision in respect of criminal matters, it is fervently hoped that the Imperial Legislature will intervene at an early date and set at rest the difference of opinion among the various High Courts by making suitable amendments to S. 162, Criminal P. C., and S. 27, Evidence Act.

42. Chiragh Din v. Emperor, (1934) 21 A I R Lah 786=1934 Cr C 1121=153 I C 228=36 Cr L J 313=36 P L R 40.

43. Har Nairan v. Emperor, (1934) 21 A I R Lah 314=1934 Cr C 545=152 I C 565=36 Cr L J 189=35 P L R 203.

44. Supdt. & Remem. of Legal Affairs, Bengal v. Lalit Mohan Singha, (1922) 9 A I R Cal 342 =62 I C 578=22 Cr L J 562=49 Cal 167=25 C W N 783.

45. Palanaidi Vedan v. Emperor,(1934) M W N 601.

THE LAW OF MERCHANDISE MARKS

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The law relating to merchandise marks is embodied in the Merchandise Marks Act, being Act 4 of 1889. As the title of the Act itself states, it relates to fraudulent marks applied to merchandise. With the advance of trade, this Act has become quite inadequate to safeguard the interests of bona fide traders, holding trade or merchandise marks of their own in respect of their articles of trade. The Merchandise Marks Act being a half-a-century-old enactment, is truly considered to be obsolete in these days, because of the number of loopholes it provides for dishonest and unscrupulous men to escape detection when they palm off their goods in a way that may not fall within the four corners of the Merchandise Marks Act. There are many cases which escape detection, as I shall show below :

Section 2, sub-s. 3 defines a false trade description. The Merchandise Marks Act punishes the offence of applying a false

trade description in cases where the offence will not fall technically under Sec. 478, I. P. C. For instance, it has been held that "where design or pattern covers the whole body of the goods and appears to be part and parcel of the goods" then there was no "trade-mark" under S. 478 nor a trade description within the terms of S. 2, sub-s. 2 or S. 4, Merchandise Marks Act. The copying of such design or pattern did not amount to an offence either under Sec. 486, I. P. C., or under S. 7, Merchandise Marks Act. It was so decided in 15 Cr L J 670.[1] From this, it is certain that certain malpractices of unscrupulous traders will certainly escape being dealt with under the Merchandise Marks Act. Unless there is a regular trade-mark law in India, the sale of spurious products as described in the above definition, is sure to continue. The law, as it stands, affords only a limited protection to bona fide traders. The term 'merchandise mark' must necessarily mean every mark whether registered or not and whether it falls under the technical definition of a trade mark under the Indian Penal Code or not, so that, bona fide traders may not suffer.

Another important question that arises when considering the Merchandise Marks Act as such, is whether the person that sets the law in motion should be an aggrieved person or not. Under the Act as it stands, it is a matter of doubt, whether on the application of "a false trade description" or for an infringement of a merchandise mark, the only person competent to set the law in motion is the person aggrieved. Of course, a trade mark means the exclusive mark of a person or trader who necessarily must suffer if the same is infringed. By analogy of the definition given in S. 28, I. P. C., and on reading S. 4, Merchandise Marks Act, one is led to think that even under the Merchandise Marks Act, on a false description being applied to the goods by an accused person only the person who is aggrieved, that is to say, only that person who has been subjected to some loss by having his merchandise mark copied, would be competent to proceed against him. Supposing a trader describes the goods as "made in Switzerland" although they are made in Japan: in that case, if a Swissman files a case saying that the application of the words "made in Switzerland" are false and would fall under the definition of applying a "false trade description", then, the accused may turn round and say: "Yes I have applied the words, but how can you hold me liable? You are not the person aggrieved as you do not hold any merchandise mark. I may have cheated people but you have no right to say I have applied a false merchandise mark because you do not hold a merchandise mark specially to yourself, which I have infringed." I am led to think from a close study of the Sections, such a defence is not unmaintainable. Great quantities of goods of a spurious character are passed off as made in a country in which they are never manufactured. That may amount to cheating in general, but a person other than the one whose merchandise mark is infringed, it seems, cannot really set the criminal law in motion against the accused according to the law as at present standing, because the accused may contend that the man who complains, granting that accused himself had applied a false trade description, cannot come to Court, because he has no property in that merchandise mark, which is infringed. If this interpretation is accepted, then the merchandise mark, like a trade mark, should belong to a person complaining who is aggrieved by the accused infringing his merchandise mark.

Merchandise mark is a genus of which "trade mark" is a species. Because trade mark has been given a technical meaning, the Merchandise Marks Act takes into account other marks which do not come under the narrow meaning assigned to a "trade mark." The Merchandise Marks Act, being a consolidated Act, deals with offences referring to both the kinds of marks, viz. trade marks and merchandise marks. Whereas trade mark refers primarily to a design whether applied to goods or not, a merchandise mark has only to be viewed from the point of view of the goods which form the articles of trade of a merchant. From some decided cases, it could be seen that where a prosecution failed under S. 486, I. P. C., it generally failed also under Ss. 6 and 7, Merchandise Marks Act.

In 32 C W N 1115,[2] it was held that where it was doubtful whether a soda water bottle could itself be considered a

1. Narumal Khemchand v. Bombay Co. Ltd., (1914) 1 A I R Sind 109=25 I C 998=15 Cr L J 670=8 S L R 39.

2. E. S. Olpadvolla v. James Wright, (1928) 15 A I R Cal 873=117 I C 691=30 Cr L J 832=32 C W N 1115.

trade mark, having regard to the language of S. 28, I. P. C., the conviction under S. 486, I. P. C., together with the conviction under the Sections of the Merchandise Marks Act was set aside. The Calcutta High Court reviewing the judgment of the Magistrate who held that the bottle itself was part of the complainant's trade mark, stated it was doubtful whether a bottle itself could be regarded as a trade mark, and hence they quashed the conviction and sentence under S. 486; and in view of the same doubt they further held that the conviction under the corresponding Ss. 6 and 7, Merchandise Marks Act, must also be set aside.

The point most emphasized, as it seems to me from the decisions, is that for a conviction under the Merchandise Marks Act, a trader must pass off his own goods as those of another. In *J. M. Dunbar* v. *Holland Bombay Trading Co.*,[3] Pratt J. C. held that the term 'merchandise' means a marketable commodity in respect of which 'a merchant has exercised some mercantile function'. If that is a correct definition, then the question to be determined in each case would be what are the goods of a complainant in respect of which he has exercised some mercantile functions? In other words, what is the special merchandise mark, which distinguishes his goods from those of others, regard being had to the definition given by Pratt J. C. to the term "merchandise" and the way in which S. 4, sub-s. 1, Merchandise Marks Act, defines a false trade description, both of which pointing to a person to be injured. The injury caused to the complainant appears to be therefore the crux of the complaint or of a charge under the Merchandise Marks Act. At p. 415 of 31 Cal 411[4] the above point seems to have been clearly touched. The Judge stated there as follows :

> The point seems to depend on whether the application of the term "Masta Marka" in the language of S. 480, I. P. C., or S. 4 (1), Merchandise Marks Act "reasonably calculated to cause it to be believed or to lead persons to believe that fishhooks sold under mark E are the merchandise of the opposite party".

In the same case, while considering the facts that go to constitute an offence under the Merchandise Marks Act, the Judges observed that

> the respondent's (namely the complainant's) right to the exclusive use of the mark which may acquire such a designation is at least not plain enough for us to consider it proved as against a person charged with an offence.

In the same judgment was found that the description complained of was too vague and uncertain for them to rely on, as the mark E was not a false trade mark or false trade description in the sense mentioned. It was held that when the appellants sold fishhooks in boxes similar to respondent's with a design of one fish with head and tail turned up, they were held not to amount to an infringement of the trade mark of respondent, who also sold hooks with the design of two fishes crossed, with their heads and tails turned up. The case in 23 I C 689[5] is an authority for the proposition that the words occurring in Ss. 6 and 7, Merchandise Marks Act, must be considered with reference to the definition in the General Clauses Act. Taking all the above cases, it is clear that some kind of mark, whether a trade mark or a merchandise mark, is necessary for the complainant to succeed in respect of a charge under Ss. 6 and 7, Merchandise Marks Act. "A false trade description" must, it appears, specifically refer to the "merchandise" of an individual or of a body of persons whose rights it should infringe. A trade description or a merchandise mark cannot be interpreted to mean a vague general right enjoyed by the public at large.

The complainant, if he admits that he has no trade mark or a merchandise mark by which he exercises some mercantile function with reference to the goods dealt with by him, cannot, it seems, maintain a charge against the accused under the Merchandise Marks Act. A complainant to succeed must show that the accused had used his trade mark or merchandise mark or something nearing that in its design or form or get-up. The main object of the Legislature in promulgating the Merchandise Marks Act is to prevent a trader passing off his own goods as those of another, as was held in *J. N. Dunbar* v. *Holland Bombay Trading Co.*[3] If that is so, the enactment clearly excludes a case of public cheating, for instance, by palming off goods as manufactured in a country different from that in which they are manufactured, although no infringement of a specific merchandise mark is therein involved. If the Act is to achieve the purpose in

3. (1919) 6 A I R Sind 93=50 I C 165=20 Cr L J 277 = 12 S L R 129.
4. Emperor v. Bakaullah Mallik, (1904) 31 Cal 411= 8 C W N 307 = 1 Cr L J 140.
5. Seena M. Haniff & Co. v. Liptons Ltd., (1914) 1 A I R L B 15 = 23 I C 689=15 Cr L J 337 =7 L B R 306.

view, deception of the public should be made the main ground of an offence and made punishable as such, after taking into consideration the various factors that seek to defeat the purpose with which the Act was enacted.

MALICIOUS PROSECUTION

The tort of wrongfully setting the criminal law in motion against another person is significantly styled "malicious prosecution". It would be better still if it were called "malicious and unfounded prosecution," apart from the name being cumbersome, for the tort is only committed in strictly limited cases. The reason is that in the public interest criminals must be brought to justice, and a prosecutor who acts honestly and on good grounds ought not to be liable for damages on account of bringing a case before the Criminal Courts for inquiry. The chief matters which a plaintiff must show, on the rare occasions when he appears to be entitled to damages, are that the defendant acted with "malice," and in the absence of what is called "reasonable and probable cause." The word "malice" is used in the technical sense of any motive, other than an honest desire to bring a person believed to be a criminal to justice.

According to the usual statement of the law, these are the elements which constitute a cause of action for malicious prosecution. The defendant must have started proceedings against the plaintiff; they must have been of a criminal nature; they must have ended in the plaintiff's favour; the defendant must have acted without reasonable and probable cause, and with malice; and the plaintiff must have been caused special damage.

Although absence of reasonable and probable cause is a negative thing, it was decided by the House of Lords in (1886) 11 A C 247[1] that the burden of proving it is on the plaintiff; it is not for the defendant to prove that he had reasonable and probable cause for his action but for the plaintiff to show that he had none. The reason is, as mentioned, that this factor is an essential part of the plaintiff's cause of action, and all essential elements in a cause of action must be proved by the person who relies upon it. Reasonable and probable cause means roughly some good ground for thinking the plaintiff guilty of a crime. This involves a genuine belief by the defendant that particular facts are true and a genuine belief that, if they are true, the plaintiff has committed a crime. The genuine belief must, in each respect, be well founded. An exact and celebrated definition was given by Hawkins J. in (1881) 8 Q B D 167[2] at p. 171 as follows:

> I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Analysis of the contents of this complicated statement is necessary. The definition says that: (a) there must be a full conviction of the existence of a state of circumstances; (b) the conviction must be founded on reasonable grounds; (c) the existence of that state of circumstances must justify an inference of guilt on the part of the plaintiff; (d) an inference of probable guilt is enough, but (e), the inference must be one which an ordinarily prudent and cautious man, placed in the position of the accuser, would draw. Finally, the accuser must genuinely believe in the guilt of the person charged. The prosecutor has no right to institute proceedings merely because it is possible that the incriminating facts are true; there must be reason to think that they really are. Again, a prosecutor has no right to draw hasty inferences which would not commend themselves to a reasonable man, and, further, if he makes a mistake on the character of some crime, and what must be proved to establish it, he takes the risk. But, on the other hand, he is not prohibited from commencing a prosecution simply on the ground that the facts do not proclaim as a matter of complete certainty that the person accused is guilty. That is a matter for the judicial tribunal to decide, and the prosecutor is not compelled to try the issue before the Court, if he is satisfied that there is a case for investigation.

1. Abrath v. North Eastern Railway Co., (1886) 11 A C 247=52 L J Q B 620=49 L T 618=32 W R 50.

2. Hicks v. Faulkner, (1881) 8 Q B D 167=51 L J Q B 268=30 W R 545.

In (1938) 1 All E R 1[3] decided on 22nd December 1937, the topic of reasonable and probable cause was carefully considered by the House of Lords, the leading judgment being delivered by Lord Atkin. On 25th January 1935, the defendant Mr. Smith, a builder, preferred before the Justices of the Peace at Edmonton a charge against Capt. Herniman, the plaintiff, a timber merchant, and against Rickard, who had carried the latter's timber, of conspiracy to defraud Mr. Smith in the supply and delivery of timber, and of obtaining 34*l*. from him in pursuance of the conspiracy. Captain Herniman was arrested, committed for trial, found guilty, and sentenced to imprisonment at the Central Criminal Court, but the conviction was quashed by the Court of Criminal Appeal.

The plaintiff had, during 1933 and 1934, been supplying the defendant with timber. This he bought from importers, and, as a general rule, his carrier, Rickard, sent a lorry with a delivery order to the docks and the timber was taken direct to the defendant's building sites. At the docks, Rickard's lorry driver received a dock pass with particulars of the timber as it left the docks, and he was supposed to copy from this the contents of the delivery note, which was signed on the site by the representative of the builder and from which the invoice was prepared.

Late in 1934 a lorry driver named Edger, who had been employed by Rickard, informed Smith that he had been instructed by Rickard to make alterations from time to time in the quantities and dimensions in copying them from the dock pass on to the delivery note. These alterations would have the effect of increasing the price Smith paid to Herniman. Smith became suspicious, and when the police obtained from the dock copies of the dock passes, which confirmed the story, the prosecution was launched, and, as stated, Herniman and Rickard were charged with conspiring to defraud Smith, and obtaining money from him by false pretences in pursuance of the conspiracy. The conviction was eventually set aside because Herniman and Rickard offered an explanation to the following effect: That Edger himself had been removing timber from Rickard's yard, and had made the alterations in the delivery notes, and made the accusations against his employer to Smith, in order to conceal his own guilt. This version of the events was accepted as true, or at least as reasonably capable of belief, so that, if Smith had asked for and been given this explanation, he might have hesitated before starting a prosecution. But, in the absence of explanation, certainly the statement of Edger, coupled with the divergencies between the dock passes and the delivery notes in the case of what were plainly identical consignments, the fact that some of the alterations were in Rickard's handwriting, and the fact that it was Herniman who would gain the most from any fraudulent alteration, were enough to induce a reasonable suspicion.

Much trouble was taken in the Courts below to ascertain whether the defendant had taken reasonable care to determine the true facts. In particular, counsel for the plaintiff argued that the defendant ought to have asked the plaintiff for an explanation. Lord Atkin quoted with approval the definition of Hawkins J. in (1881) 8 Q B D 167[2] and, applying that, he thought that the truly relevant evidence was the facts on which the prosecutor in fact did act.

On principle, other facts, upon which he did not act, appear to be irrelevant. When the Judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused.

Speaking of the argument that an explanation should have been invited, his Lordship said that no doubt circumstances might exist in which it would be right, before charging a man with misconduct, to ask him for an explanation, but certainly no general rule could be laid down. The practical consideration intervened that, if this were done in some cases, material evidence might be made to disappear. It was not required of any prosecutor that he must have tested every possible relevant fact before he took action. His duty was not to ascertain whether there was a defence, but whether there was reasonable and probable cause for a prosecution on the whole of the facts. Therefore his Lordship had come to the same conclusion as the Court of Appeal, that there was no want of reasonable and probable cause. Lords Russell of Killowen, Macmillan, Maugham and Roche agreed.

The decision creates no new law. It will however be very helpful when an authority giving a clear account of "want of reasonable and probable cause" is required. It has in addition exposed a fallacy. It is wrong to import into the law

3. Herniman v. Smith, (1938) 1 All E R 1.

of malicious prosecution notions derived from the law of negligence, and so set on foot a tedious inquiry into whether the defendant took reasonable care. The material question is: What information came to the defendant's mind? It is upon this that the issue is to be decided. — *The Law Journal.*

Reviews

Law and Practice of Banking (Edn. 3), *by* SOHRAB R. DAVAR, Barrister-at-Law, Advocate (O. S.), Bombay: Published by Butterworth & Co. (India) Ltd., Avenue House, Chowringhee Square, Calcutta. Pages 732. Price Rs. 10 net.

The fact that the 2nd edition was sold out in a little over a year bears ample testimony to the popularity of the book. This edition has been carefully revised and brought up-to-date, in many particulars. The principles of Banking Law have been clearly explained and are well illustrated and supported by legal decisions, both Indian and English. The book is bound to retain its popularity with the legal profession and the Bank Officers. The printing and get-up are good and the price moderate.

The Hindu Code (Edition 4), *by* SIR HARI SINGH GOUR, M.A., D. Litt., D.C.L., LL.D. The book can be had at the Central Book Depot, Nagpur. Pages 1277. Price Rs. 20 net.

This monumental book on Hindu law needs no introduction to the legal profession. The author, well-known for his learning, research and industry, has in the present edition taken care to see that every obsolete case and principle is omitted; and in so doing he has practically rewritten the entire work, condensed it in parts, annotated all the Sections and added to them wherever necessary. Thus the book has been made up-to-date in every detail. We are sure the present edition will be very much appreciated by the members of the Bench and the Bar. Further, it is bound to be of immense help to the Legislature, should they undertake the task of codifying the Hindu law. The printing is good and the get-up attractive.

Mayne's Treatise on Hindu Law and Usage (Edn. 10), *by* S. SRINIVASA IYENGAR, B.A., B.L., Advocate: Publishers Higginbothams, Madras. Pages 1057. Price Rs. 21.

The publishers and editor of this edition deserve to be congratulated for bringing out an up-to-date edition of this authoritative book, especially in view of the fact that it is 16 years since the last edition was published. During this long interval of time, Hindu law which is essentially a judge-made law has undergone material changes, both by a great number of decisions and by legislation, and the editor's task must have been one of exceptional difficulty. While a great part of what Mr. Mayne wrote has been retained, many parts of the work have been re-written and two new chapters have been added, one on the Hindu Women's Rights to Property Act and the other on Impartible Estates. The development of Hindu law which was an integral part of Mr. Mayne's book has been revised in view of the later researches and wealth of material made available by several Sanskrit scholars. The three appendices giving Samskars and Order in obsequies, Order of Bandhu Succession in Mitakshara and the Marumakkattayam and Aliyasantana law add considerably to the comprehensive nature and utility of the book. The case law has been brought up to the end of July 1938. We trust that this edition of Mayne's Hindu Law which has come to be a classic will continue to be one of the standard works on Hindu law.

MR. H. V. DIVATIA, M.A., LL.B.,

JUDGE, HIGH COURT, BOMBAY

Born 17th February 1886. Native place, Ahmedabad. Educated at Gujarat College, Ahmedabad. Passed B.A. Examination in 1906 with distinction in Political Economy and Moral Philosophy. Won the Dhirajlal Mathuradas Scholarship for standing first among Gujarati students. Worked as Fellow and Lecturer in Logic and Moral Philosophy for two years in Gujarat College at Ahmedabad. Passed M.A. Examination in 1908 in First Class with Philosophy. Awarded the Telang Gold Medal

and Prize. Passed LL.B. Examination in 1909. Occupied the post of Professor of Philosophy and Economics in Bareilly College in the United Provinces for two years, 1910-1912. Started practice in Law on the Appellate Side of the Bombay High Court in 1912. Elected as a Member of Bombay Council in 1928. Became its Secretary in 1932. Elected as a member of the Bandra Municipality for Khar suburb in 1930. Appointed Judge of the Bombay High Court in June 1933.

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MR. K. B. WASSOODEW, B.A., LL.B.,
JUDGE, HIGH COURT, BOMBAY

The Hon'ble Mr. Justice K. B. Wassoodew, B.A., LL.B., Matriculated in 1899 and joined Elphinstone College. After Intermediate examination, joined St. Xavier's College in 1901 to study Latin. Secured Honours at the B.A., in Latin. First Class in First LL.B., and topped the list in Second LL.B., obtaining the Judge Spencer Prize. Qualified for Mangaldas Scholarship and kept terms for the O. S. Examination.

In 1907, joined the Provincial Civil Service as a Deputy Collector. But in 1911 changed over to the Judiciary. Became a permanent District and Sessions Judge in 1924, and gradually rose to the rank of a First Grade Judge.

In 1936, finally, he was appointed a Puisne Judge of the Bombay High Court. He is the First District and Sessions Judge of the Provincial Service to become a Judge of the High Court after the late Mr. Justice Ranade.

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MR. N. P. ENGINEER, B.A., LL.B.,

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Born on 22nd January 1884. Educated at Byramjee Jeejeebhoy Institution and Elphinstone College. Passed B.A. in 1904. Dakshina Fellow, Elphinstone College.

Passed LL.B. in 1906. Enrolled as an attorney of the High Court in 1909. Enrolled as an Advocate O. S. in 1921. Appointed Additional Judge in November 1936.

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Born 1888. Educated at Hindu High School and Presidency College, Calcutta, and later on at Cambridge. Graduated at Calcutta 1909. Holder of Government of India Scholarship 1910. Tripos in Moral Sciences at Cambridge, 1913. Won the Member's Prize for English Essay at Cambridge. Joined I. C. S. 1913. Assistant Collector in Bombay Presidency 1913—1920. Assistant Judge 1920—1923. Secretary to Legislative Council 1923—1924. Joint Judge and District Judge 1925—1928. Registrar, High Court, 1928—1931. District Judge, Hyderabad, Sind, 1931—1934. Officiated as High Court Judge 1934—1937. Remembrancer of Legal Affairs 1934—1937. Additional Judge, High Court, since November 1937.

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SUITS FOR INJUNCTIONS AGAINST MUNICIPALITIES

Necessity of Notice

Present Law Requires Amendment

by BALWANT SINGH LOKRAM, ADVOCATE, *Shikarpur, Sind.*

Municipal Corporations and their officers and servants enjoy certain statutory privileges regarding suits brought against them in respect of any act purporting to be done under the provisions of the Municipal Act or any by-law, rule or order made thereunder, or in respect of any alleged neglect or default in the execution of the Act. The provisions in the various statutes conferring these privileges are intended to give the several municipal authorities protection against being sued except in the manner provided in the several statutes for acts purported to have been done by them under the statute but which do not come within its terms. The said privileges are : (1) Necessity of notice prior to suit. (2) Lapse of certain time from the issue of such notice to enable the municipal authorities to consider their position and to tender amends, if necessary. (3) Institution of a suit within a special period from the accrual of the right to sue, usually six months. The object of the notice is to give to the corporation or the officer or servant concerned an opportunity of setting matters right, making amends, and restoring what has been taken or paying for the damages which have been done.

The provisions of law on the above subject, so far as they are applicable to the Bombay Presidency and the Province of Sind (except the City of Bombay) are found in S. 206, Bombay Municipal Boroughs Act, 1925, S. 167, Bombay District Municipal Act, 1901, S. 255, City of Karachi Municipal Act, 1933 and S. 136, Bombay Local Boards Act, 1933. At one time there was a conflict of decisions on the question whether prior to the institution of a suit for injunction, that is for the prevention of an act or omission, a notice, if required by law, is absolutely necessary. There had been a marked difference of opinion between the views taken by the Bombay High Court on the one hand and the High Courts of Calcutta, Madras and Allahabad on the other. In a ruling under S. 80, Civil P. C., 1908, which deals with the requirement of notice of suit intended to be filed against Government, it was held by the Bombay High Court that in suits to restrain by injunction the commission of some official act prejudicial to the plaintiff where the immediate result of the act would be to inflict irremediable harm, S. 80 did not compel the plaintiff to wait for two months before bringing his suit.

In 18 Bom L R 243[1] the plaintiff gave a notice of suit to Government under S. 80, Civil P. C., on 2nd May 1912. In the meanwhile, Mamlatdar threatened to demolish the property which was the subject-matter of suit. The plaintiff thereupon filed the suit on 19th June 1912, praying for a declaration that a piece of land in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it. It was objected that the suit was bad as having been brought within two months from the date of the notice. Held, that the suit was not barred by S. 80, Civil P. C., 1908, as the plaintiff had to precipitate the institution of the suit owing to the threat held out by the defendant's agent to demolish the property in suit during the currency of notice. In the course of the judgment, Batchelor J. observed :

> I am of opinion, as I said in 37 Bom 243,[2] that the object of S. 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice. If, then, that is the object of the Section which in terms allows a private litigant to sue the Secretary of State for redress, it appears to me undesirable to extend the meaning and the scope of the Section so as to produce this result, that although a private person is empowered to sue the Secretary of State after two months' notice, yet the Secretary of State's agent during the currency of two months is to be permitted to destroy the material object which is the very subject-matter of the suit. . . . . It is small gain to a private person to enact that he may have redress against a defendant after two months' notice, if during the currency of two months, the defendant is allowed to make redress impossible. The right of suit, which is expressly granted by the Legis-

1. Secy. of State v. Gulam Rusul, (1916) 3 A I R Bom 296=34 I C 535=40 Bom 392=18 Bom L R 243.
2. Naginlal Chunilal v. Official Assignee, Bombay, (1913) 37 Bom 243=17 I C 876=14 Bom L R 1148.

lature, cannot, in reason, be deferred until its exercise has become illusory.

The High Courts of Calcutta, Madras and Allahabad, after some difference of opinion among their Subordinate Courts, held that S. 80, Civil P. C., 1908, and S. 424, Civil P. C., 1877, which it superseded, are to be strictly complied with and are applicable to all forms of action and all kinds of relief. The Sind Court adopted the view of the Bombay High Court, in 3 S L R 175,[3] 7 S L R 31[4] and 14 S L R 46,[5] where it was held that service of notice prescribed by the statute is the condition precedent to the institution of a suit for an act already done under the powers conferred by the statute, but not to the institution of a suit which aims at preventing an act from being immediately or irrevocably done. But the decision of the Privy Council in A I R 1927 P C 176[6] has however set the controversy at rest. In that case it has been held by their Lordships that a suit, the notice whereof to the defendant is a statutory obligation to be fulfilled before the institution, cannot be proceeded with, if no such notice has preceded it, and that even a suit for injunction is not an exception to the rule requiring the formality of notice being gone through, whatever the hardship to the plaintiff, a strict insistence of this rule may entail. Judges have to interpret the law as it is and not as it ought to be.

The above Privy Council case was followed by the Sind Court in A I R 1928 Sind 76[7] where, treating the Bombay view on the point as exploded law, it was held that a suit in which inter alia an injunction is prayed for is still 'a suit' within the meaning of the words of S. 80 which imposes a statutory and unqualified obligation in respect of the notice contemplated under the Section, and the Section applies to a suit for injunction even where the delay of two months, contemplated by the Section, is likely to result in immediate injury to the plaintiff. In A I R 1930 Sind 287[8] (a case under the Bombay District Municipal Act, 1901, for injunction), Rupchand A. J. C., after discussing the case-law on S. 80, Civil P. C., and the observations of their Lordships of the Privy Council in A I R 1927 P C 176[6] observed :

> To my mind, these weighty observations apply *mutatis mutandis* to a suit under S. 167, Bombay District Municipal Act (corresponding to S. 206, Bombay Municipal Boroughs Act, 1925).

It was held in that case that a suit for injunction brought against a Municipality without previous notice is liable to be dismissed. This ruling was given in the case at a preliminary stage, in an appeal on an order on an interlocutory application under O. 39 for temporary injunction. At a later stage Mehta A. J. C. tried the suit and concurring with Rupchand A. J. C., dismissed the suit for want of notice under S. 167, Bombay District Municipal Act, 1901 : A I R 1932 Sind 104.[9]

From the perusal of the above case-law on the subject, one thing is clear, that the learned Judges of the High Courts, while interpreting the law as it stands, did realize that in suits for injunction, giving of notice and waiting for two months would very often frustrate the very object of the suit. In that connexion, it is worthy of note to reproduce here some remarks from the judgment of Rupchand A. J. C. in A I R 1930 Sind 287[8] :

> I am quite conscious of the serious consequences which are likely to result from adopting this view, and deviating from the practice which has hitherto been adopted, of permitting such suits without notice . . . . . But Judges are not responsible for Acts passed by the Legislature, and, in the words of Lord Bacon, they ought to remember that their office is *jus dicere* and not *jus dare*, to interpret the law and not to make law or give law. It is their duty to abide by the words of the statute without attempting to reform it according to the supposed intention of the Legislature, or exclude cases which fall within the express meaning of the rules in order to make the law reasonable.

In the next paragraph in the same judgment, the learned Additional Judicial Commissioner suggests that the provisions of law in India relating to suits against public authorities should be brought in line with the English law. Referring to the Public Authorities Protection Act, 1893, the learned Judge observes :

> The Public Authorities Protection Act, 1893, has made radical changes on this subject while continuing to afford protection to public authorities and employees by depriving a plaintiff of his right to file a suit after a certain period from the

3. Fundoomal v. Mahomed Shariff, (1909) 3 S L R 175=4 I C 1156.
4. Mohamedali v. Karachi Municipality, (1913) 7 S L R 31=20 I C 572.
5. Virji v. Karachi Municipality, (1920) 7 A I R Sind 9=56 I C 527=14 S L R 46.
6. Bhagchand Dagdusa v. Secretary of State, (1927) 14 A I R P C 176 = 104 I C 257 = 51 Bom 725=54 I A 338 (P C).
7. Vishnomal v. Court of Wards, Sind, (1928) 15 A I R Sind 76=105 I C 729=22 S L R 63.
8. Daily Gazette Press Ltd. v. Karachi Municipality, (1930) 17 A I R Sind 287=127 I C 690 =25 S L R 142.
9. Daily Gazette Press Ltd. v. Karachi Municipality, (1932) 19 A I R Sind 104=137 I C 348=26 S L R 78.

date of the cause of action, it has provided that want of previous notice of the intended suit is no bar to the maintainability of the suit, but empowers the Court to mulct the plaintiff in costs, where such notice if given might have prevented litigation.

This Act also contains a very healthy proviso, that it shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority. An amendment of the sections pertaining to suits against local authorities on the lines of the above Act is long overdue, and I think it will not be too much to suggest that it is desirable that the provisions relating to suits against public authorities in India should be brought in line with the English law.

Section 49, Punjab Municipal Act, 1913, which deals with the point of notice of suit, exempts the suits for injunction from its operation by including a proviso in the following words :

Provided that nothing in this Section shall apply to any suit instituted under S. 54, Specific Relief Act, 1877.

The United Provinces Municipalities Act, 1916, while providing the necessity of notice of suit in S. 326, contains a saving clause with respect to suits for injunction in the following words :

(4) Provided that nothing in sub-s. (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding.

It is a wonder that the Government of Bombay did not take notice of the weighty suggestions of the Court of the Judicial Commissioner of Sind in eight years' time and now that Sind has its separate Legislature, it is expected that S. 167, Bombay District Municipal Act, S. 206, Bombay Municipal Boroughs Act, S. 136, Bombay Local Boards Act, and the City of Karachi Municipal Act will be amended as early as possible, so as either to altogether save suits for injunction against Municipalities and local boards from the operation of the above provisions or amend them to bring them in line with the English law as contained in the Public Authorities Protection Act, 1893.

INSTALMENTS UNDER THE U. P. AGRICULTURISTS' RELIEF ACT

by N. D. PANT, *Advocate, High Court, Allahabad.*

Proviso 1 to S. 3 (1), United Provinces Agriculturists' Relief Act (Act 27 of 1934 as amended by Act 3 of 1935), empowers the Court to grant instalments not extending beyond a period of 4 years in cases of agriculturists to whom Ch. 3 of the Act applies, and up to 15 years in the cases of other agriculturists. Thus, whether an applicant for instalments would be entitled to a period of 4 years or 15 is determined exclusively by the applicability or otherwise of the chapter to his case. The term 'agriculturist' is defined in S. 2, sub-s. (2) (a) to (h) of the Act. Proviso 1 to the Section lays down that for S. 3 and certain other purposes, the term 'agriculturists' would also mean persons (hereinafter called the bigger agriculturists) who would belong to the above classes if the limits to land revenue, local rates, etc. were omitted. It may be noted that Ch. 3 is not included in the Proviso, with the result that the bigger agriculturists would not come within its scope.

Chapter 3 of the Act includes Ss. 9 to 27, of which Ss. 11 and 12 deal with the redemption of mortgages. The other Sections are merely declaratory or procedural governing disputes arising between mortgagors and mortgagees. S. 11 gives a summary remedy to the agriculturist to redeem possessory mortgages executed by him after the Act, while S. 12, which is much wider in its scope, entitles a mortgagor or any other person competent to institute a suit for redemption, to file an application at any time after the principal money has become due, *and before a suit for redemption is barred*, praying that the mortgaged property be redeemed. The right to apply under this chapter would therefore remain with the mortgagor in cases covered by O. 34, R. 2 till the final decree is passed under R. 3 (2) of the same Order. Similarly an applicant whose property has been ordered to be sold under O. 34, R. 4, Civil P. C., has a right to redeem his mortgage at any time before the confirmation of the sale: *vide* O. 34, R. 5, Civil P. C. In the cases of suits for redemption filed under the general law, the mortgagor would also be entitled to file an application under S. 12, Agriculturists' Relief Act, so long as the final decree debarring him from all rights to redeem the property has not been passed under O. 34, R. 8 (3)(a), Civil P. C. It necessarily follows that if the phrase "an agriculturist to whom

Ch. 3 applies" is interpreted to mean "who is entitled to redeem his mortgage under Ch. 3" more than four instalments cannot be granted in the above cases.

There has however been a sharp divergence of opinion between the Allahabad High Court, and the Oudh Chief Court on the question of the interpretation of the relevant phrase. The latter Court in A I R 1937 Oudh 141[1] held that "agriculturists to whom Ch. 3 applies" merely means persons falling under Cls. (a) to (h) of S. 2, as this chapter only applies to them and not to the bigger agriculturists. According to the Oudh view, the fact that the chapter prescribes rules for redemption of certain mortgages is immaterial for the purpose of construing the Proviso to S. 3 "as the reference in the Proviso is not to the nature of proceedings in which instalments are to be fixed, but to the status of the agriculturists to whom instalments are to be given." Their Lordships thought the reason behind the rule to be "in the cases of decrees against smaller agriculturists which would generally be decrees of comparatively smaller amounts, a shorter period of instalments would meet the requirements of the case, while a larger period was necessary in the case of decrees which would be for large amounts against bigger agriculturists." Consequently, the Oudh Court would give an agriculturist of the smaller class instalments extending over a period of four years only irrespective of the fact as to whether the transaction in suit were simple debts or mortgage debts. In 1937 A L J 1134,[2] the Allahabad High Court expressly dissented from this view, and held that Ch. 3 has absolutely no application in cases of simple debts, in which there is no relation of mortgagor and mortgagee between the parties. In the opinion of their Lordships of the Allahabad High Court there was no justification for substituting the words "who come under group (a) to (h) of S. 2" for the words to "whom Ch. 3 applies." Their Lordships remark about A I R 1937 Oudh 141[1] as follows :

> The Oudh decision comes to this that the agriculturist within the meaning of the first category in the Proviso to S. 3 must be an agriculturist who is within the maximum limits prescribed [viz. S. 2 (a) to (h)] and not one without such limits. But this interpretation of S. 3 would be directly contrary to the provisions of the Proviso to S. 2 under which in S. 3 also an agriculturist means one as to whom the limits are to be omitted. This point does not appear to have been pressed before the Oudh Bench.

In 1937 A L J 1134[2] the revision petition was directed against the grant of 28 six-monthly instalments by the lower Court in the case of a simple money decree. As the relationship between the parties was not that of a mortgagor and a mortgagee, it was held that the debtor was not a person to whom Ch. 3 applied, and the lower Court would have been within its jurisdiction in extending the instalments to a period of 15 years. In the course of the judgment their Lordships have however remarked :

> It follows that the only possible interpretation to be put on the Proviso to S. 3 is that the person referred to therein for whom a four years' limit is prescribed is one *who has made an application under Ch. 3 and to whom Ch. 3 therefore applies.*

With great respect it is submitted, if their Lordships intended the above statement to be accepted literally, the words of the statute "to whom Ch. 3 applies" would have to be read as "who have applied under Ch. 3." The passage may also be construed to mean that an agriculturist who has not applied under Ch. 3 would get 15 instalments, whereas if he has done so he would get only four. The Legislature could never have intended to prejudice the rights of the applicants under Ch. 3, which they would otherwise possess. In any case, the words italicized should be considered to be obiter, as their Lordships had only to decide the question of the applicability of Ch. 3 in cases of simple money decrees. The proper test to be applied in all such cases should be whether the debtor is entitled to redeem his mortgage under S. 11 and S. 12, Agriculturists' Relief Act. If he is, then it is submitted, he is an agriculturist to whom Ch. 3 applies, irrespective of the fact whether he has filed an application under that chapter or not and more than four instalments cannot be given to him. This view is fortified by the decision of Allsop J. in 1936 A L J 465,[3] which has been cited with approval by their Lordships of the Allahabad and Oudh Chief Courts, though on a different point.

The question of instalments in the case of mortgage debts directly arose for deci-

1. Girwar Singh v. Ramman Lal, (1937) 24 A I R Oudh 141=165 I C 713=12 Luck 630 =1936 O W N 1090.

2. Muzaffarnagar Bank Ltd. v. Fatta, (1937) 24 A I R All 778=172 I C 593=I L R (1937) All 951=1937 A L J 1134.

3. Ram Ghulam v. Bandhu Singh, (1936) 23 A I R All 434=163 I C 564=58 All 941=1936 A L J 465.

sion in 1937 A L J 1291.[4] Their Lordships, Harries and Rachhpal Singh JJ., purporting to follow the Allahabad views (probably cases in 1937 A L J 1134[2] and 1936 A L J 465[3]) held that a "mortgagor-agriculturist" is the person to whom Ch. 3 applies. The statement of law may be absolutely correct with reference to the facts of the particular case, but if taken literally it is submitted, the term "mortgagor-agriculturist" is liable to be misinterpreted. It cannot be stated as a general rule that the cases of all "mortgagor-agriculturists" are within the purview of Chap. 3, as this chapter does not include the bigger agriculturists. Secondly Ch. 3 would not apply in the cases of mortgagor-agriculturists, whose right to redeem the property has become barred, as an application under S. 12 can only be made "*before a suit for redemption is barred.*" Thus the Court would be entitled to grant instalments extending to a period of 15 years, in cases of decrees (which would undoubtedly be against "mortgagor-agriculturists") passed under O. 34, R. 6, Civil P. C., for the balance of mortgage debts. This decision is however clearly an authority for the proposition that the maximum instalments that can be given to a mortgagor, who has a subsisting right of redemption under Ch. 3 cannot extend to a period beyond four years.

Their Lordships in A I R 1937 Oudh 141[1] did not probably have the advantage of hearing the opposite party and it is possible, as pointed out by Sulaiman C. J. and Harries J. in 1937 A L J 1134,[2] provisions in S. 2 were not properly pressed before their Lordships. It is further submitted it is not correct to lay down as a general rule that the extent of indebtedness of an agriculturist depends on the amount of Government revenue, rent, etc. that he pays. On account of his limited resources, it is submitted, the smaller agriculturists are exactly the class of persons who would need larger period for instalments. Apart from this, the Legislature may have deliberately introduced the four years' rule in the cases of mortgage debts as the secured creditors were entitled to have their debts satisfied as soon as possible. The mortgagor-agriculturists falling under S. 2 (a) to (h), having a subsisting right to apply under Ss. 11 and 12, Agriculturists Relief Act, alone would be limited to four years instalments, while all others will be entitled to get the larger period. The Oudh Chief Court may have to review its decision in A I R 1937 Oudh 141[1] in the light of the decisions of the Allahabad High Court.

Their Lordships of the Oudh Court are perhaps correct in laying down that the bigger agriculturists, whether their debts be secured or not, would be entitled to instalments extending to a period of 15 years. This aspect of the case has not yet been discussed by the Allahabad High Court in any reported decision. The Legislature, while giving the bigger agriculturist a right to apply for instalments under Sec. 3, has obviously overlooked the fact that the non-applicability of Chap. 3 of the Act to them, has placed the mortgagor-agriculturist of this category in a more advantageous position than the mortgagor-agriculturists of the classes falling under Sec. 2 (a) to (h).

4. Mir Umrao Ali v. Subedar Rup Singh, (1938) 25 A I R All 26 = 172 I C 991 = 1937 A L J 1291.

ANOMALY ABOUT SECTION 20 OF THE INDIAN LAW OF LIMITATION

by ASWINI KUMAR SEN, B.L., PLEADER (SIR J. M. TAGORE MEDALIST),

Alipurduar, Jalpaiguri.

A cloud of doubts and uncertainty is gathering round Sec. 20 of the Indian Law of Limitation, after its amendment in 1927. The Section, as it stood before the amendment, was comparatively definite and clear. But as in the case of payment of interest paid as such, an endorsement of the same was not necessary for the starting of a fresh period of limitation, the creditor could easily make a false entry of interest payment by a person other than the debtor or his agent (and sometime proving such payment by some parole evidence) and thereby save limitation of his time-barred claim. In order to avoid such undesirable things, the Indian Legislature made an amendment of the Section in 1927; but the wordings of the amendment were very unhappily chosen. Cl. (1) of the Section now runs thus :

> Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such

by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf,
or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or his agent duly authorized in this behalf,
a fresh period of limitation shall be computed from the time when the payment was made. Provided that save in the case of a payment of interest made before the first day of January 1928 an acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making the payment.

By the use of the words "part of the principal" in Para. 2 of this clause, the Section makes it specifically clear that part payment of the principal will save limitation but the words "part of" do not occur before the word "interest" in Para. (1) of the clause. From this, one can reasonably say that the old as well as the amended Section intended that although a part payment of the principal may save limitation, yet in order to save limitation by a payment of interest, the whole interest accrued at the time and not a part thereof, shall be paid. Such an explanation of the Section would have been too drastic and hard for all, to debtors and to creditors alike: but fortunately the point was decided long ago and all the High Courts of India now uniformly hold that a part payment of the interest too, is sufficient to give rise to a fresh period for the entire debt.

But the greatest controversy that has arisen regarding the explanation of the Section, is due to the presence of the words "as such" in Para. 1 of Cl. (1) of the Section. In the Allahabad Full Bench case, 58 All 261,[1] where money was paid by the debtor without mentioning whether it was payment made towards interest or towards the principal, and the creditor appropriated it wholly towards interest, the majority of their Lordships of the Full Bench Judges held that there was neither the payment of interest as such nor part payment of the principal within the meaning of the Section, and therefore time could not extend by such payment. On the other hand in the Patna case, A I R 1938 Pat 183,[2] his Lordship, Courtney-Terrell C. J., held that where a judgment-debtor makes a part payment to the decree-holder, such payment saves the entire debt from limitation and any appropriation made by the decree-holder either towards interest or towards the principal is immaterial. There his Lordship held that the words "as such" were intended to make it clear that in the case of interest payment before January 1928, when no writing was necessary for the payment of interest, it would be clear that the payment was actually made towards interest and not left as a matter of doubt.

Almost similar were the views of their Lordships, Pandrang Row and Abdur Rahman JJ., of the Madras High Court, in A I R 1938 Mad 601,[3] where, after a full discussion of all the contemporary views of different High Courts on the point, their Lordships held that in the case of an endorsement of payment, which does not state that the payment is towards the principal or interest, the creditor can show by extrinsic evidence that the payment in question was the payment of interest as such and thereby save limitation—a view in direct opposition to the Allahabad Full Bench decision. Again in A I R 1938 Rang 280,[4] a view similar to the Patna High Court view was upheld.

We are not yet fortunate enough to get the views of one and all the High Courts and Chief Courts in India on the point. Nor has there been yet any ruling of their Lordships of the Privy Council in the matter, which could possibly set all these differences at rest and the Section like the "oracle of Delphi" can now be construed in either of the two opposite ways we like. Exhaustive commentaries have been written over the Section and perhaps much more are to be written in future. Much intellectual blood is being daily shed in the Indian Civil Courts in expounding the Section. All these may supply intellectual food for the jurists and forensic scholars but they sadly remind us that an Indian Statute of today, though brought into being with great care and deliberation, is so badly in need of judicial modulation and judicial legislation like the English Chancellor's Equity of the past centuries.

It is not a very happy thing that an anomaly should be allowed to exist over a law point owing to the ambiguity of its wordings. In this particular case we have mentioned, the affairs of the Subordinate

1. Udaipal Singh v. Lakshmichand, (1935) 22 A I R All 946=159 I C 387=1935 A L J 1029 =58 All 261 (F B).
2. Bankanidhi Santra v. Godi Patna Co-operative Society, (1938) 25 A I R Pat 183 = 174 I C 1005 = 16 Pat 294 = 18 P L T 563.
3. K. Kandaswami Mudaliar v. Thevammal, (1938) 25 A I R Mad 601 = (1938) 1 M L J 620.
4. Khan Sahib v. Uchil Ahmed Lebbay, (1938) 25 A I R Rang 280 = 176 I C 865.

Courts under those High Courts, which have not yet given their decisions on the point, are likely to be in a chaotic condition. There, the different Judges may prefer different High Court views and sometimes, the same Judge may, on different occasions, entertain different High Court views we have mentioned above, and this he may do, as he pleases, for none of them is binding on him, they being not the decisions of his own High Court. Such uncertain state of this law-point shall continue in all those Subordinate Courts until a case is dragged before each High Court in appeal. But how rarely do the Subordinate Court cases go up to the High Court in appeal? Yet how important and frequent is the application of this Section by the Judge, by the lawyer and still more by the litigant public, who do actually make endorsements on their bonds? Almost 90 per cent. of the bonds and pro-notes of this country require endorsement under S. 20, Lim. Act, and that mostly is done by laymen, who are quite unable to understand the delicate intricacies of the Section when the great jurists themselves do get perplexed thereby. The history of the evolution of law and justice tells us that Legislature alone can give us the most perfect form of law and the first and foremost duty of the Legislature, in propounding laws, is to make them plain, uniform, definite and capable of being easily understood by the people. In this particular case if it was the intention of the Legislature that a part payment of the interest too would save limitation, then they ought to have inserted the words "part of" after the first word of the Section. But even the amendment of 1927 did not touch the point. As regards the other point we have dwelt upon, if the above mentioned Madras and Patna views are assumed to be correct, then it is to be admitted that the Section has been too concise, and a few more words to express the thing clearly would not make the Section too much bulky. Far from so doing, they would save a great deal of time and trouble of the Judges and lawyers alike.

To add here one point more, we do not understand why the Legislature did not intend that the part payment of a legacy, like the part payment of the principal of a debt, should be competent to save limitation when any payment of the interest of the same legacy has been deemed competent to do the same. We hope the Indian Legislature will soon remove all these inconsistencies from the Section by making necessary amendments and thereby render the Section plain and uniform without having any loop-hole for surmises and necessity for judicial legislation in the matter.

SALARY OF PUBLIC SERVANTS

by P. C. BASU, BARRISTER-AT-LAW, Calcutta.

Whether S. 73, Civil P. C., applies in a case of salary attachment under S. 64 and attached under O. 21, R. 48, appears at first sight not free from doubt. Normally a decree-holder is entitled to an order under S. 73 if two conditions set out in that Section are fulfilled before the assets are held by a Court. The two conditions are as follows :

(1) He must have a money decree against the same person :

(2) He must have applied for execution of that decree before the assets were realized.

In 23 All 106[1] at page 111, Sir John Strachey C. J. indicated fulfilment of a further condition, that is to say that a decree-holder is not to be allowed to share in the proceeds of an execution where he could not have lawfully himself had that property taken in attachment and sale of his own decree. The learned Chief Justice realized however that the language of Sec. 73 did not support him but maintained that the Section could not read absolutely literally. This decision has been distinguished and even doubted by the Calcutta High Court in 30 I C 49.[2]

The Madras High Court has held that there is no condition that the execution application put in by a decree-holder should be such as would have ended in his successfully obtaining satisfaction of his decree: 49 M L J 753[3] at p. 754.

It may be that Sir John Strachey's decision still operates in cases where the

1. Bithaldas v. Nandkishore, (1901) 23 All 106.

2. Gopal Chandra Bose v. Harimohan Dutt, (1916) 3AIRCal 264=30 IC 49=21 CLJ 624.

3. Subramanian Chetty v. Ramaswamy Chetty, (1926) 13 A I R Mad 179=91 I C 11=49 M L J 753.

application for execution was not maintainable, viz. where no decree had been obtained or where the application for execution was barred by some statutory provision, e. g. Limitation Act or the principles of res judicata. This decision however is clearly distinguishable.

Sub-rule (2) of R. 48 does not bar any attachment being levied nor does it declare that such attachment would be invalid. It only indicates what the officer has to do when he received such a prohibitory order The provision relating to furnishing of particulars indicates that the intention of the Legislature was that it would benefit a decree-holder, who has subsequently levied his attachment to come to that Court which originally levied attachment for invoking the aid of S. 73 for rateable distribution. I may add that an application under S. 73 lies even when the other decree-holder's application is pending in other Court: A I R 1929 Rang 198.[4] In the Bombay High Court the identical question arose. Chandavarkar and Batchelor JJ. held that S. 73 applies to a case of attachment under O. 21, R. 48 : 16 I C 640.[5] The Code has now here provided that the salary so attached is not "assets" within the meaning of S. 73.

In these circumstances it is evident that the salary attachable under S. 64 and actually attached under O. 21, R. 48, Civil P. C., is liable to rateable distribution under S. 73 if the two conditions mentioned aforesaid had been fulfilled.

4. Chettyar M. T. T. K. M. M. N. v. Firm K. P. A. N. M., (1929) 16 A I R Rang 198=120 I C 693.
5. Velchand Chhaganlal v. Musson, (1912) 14 Bom L R 633=16 I C 640.

EXTRACTS FROM CONTEMPORARIES

Self-importance in Court

The law is no respecter of persons. Even the chairman of a company, of the mature age of eighty-three and of high-standing in his own town, must submit to sit quietly in court, and restrict himself to making offensive comments in his thoughts only.

This unpleasant lesson was learnt by a gentleman concerned in litigation in the King's Bench recently. While counsel of the other side was opening his case, the man of high provincial standing ejaculated "It's lies," and then fretfully, "I can't sit here." After that the Judge turned him out. "When he is in a proper frame of mind to listen to the other side without interrupting he can come back."

As he rose to go, the great man uttered again, "The Judge doesn't know I am one of the best known men in——. He is treating me as if I had no standing. It is a slur on my character."

Self-importance and bad manners are out of place in the King's Courts. There, even men of local importance are well advised not to parade their greatness lest one greater than themselves rebuke them.—

Justice of the Peace.

Review

The Law relating to Places of Entertainment and Amusement, BY K. VENKOBA RAO, M.L., *Advocate, Madras.* Copies of the book can be had of the Author at 1/31, Nallathambi Mudali Street, Triplicane, Madras (S. India). Pages 1360. Price Rs. 15.

This book appears to be the first of its kind on the law relating to subjects which are concerned mainly with the activities of the people during their leisure moments, viz. play, cinematograph, music, sport and pastimes such as cricket, football, golf, etc., the wider social intercourse obtained at clubs, and the attractions of travel involving visits to hotels and inns. The rights, liabilities and duties of the public and the proprietor in regard to places providing entertainment and amusement have been fully explained. The discussion on the legality of cross-word competitions in the light of recent English and Australian decisions will be of special interest to many. References have been made not only to Indian and English authorities but also to American and other foreign decisions. The case law has been brought down to June 1938. The book will surely serve as a *vade mecum* to lawyers, artistes, proprietors and others having the management of places of entertainment and amusement so as to enable them to find out the law on any point with facility. The printing and get-up leave nothing to be desired.

MR. A. T. HARRIES, B.A., LL.B. (CANTAB), BAR-AT-LAW,
CHIEF JUSTICE OF THE PATNA HIGH COURT.

Born 13th June 1892. Had a brilliant and remarkable academic career at the University of Wales and the Emmanuel College, Cambridge. Passed in first class both Part I and Part II, Law Tripos, in 1921. Also George Hong Prizeman and won the Chancellor's Medal. Was called to the Bar in 1922 from the Middle Temple. Practised

from 1922 to 1934 in South Wales Circuit. Took part in the Great War between 1915-1919. Was Captain of the Second Battalion, Royal Welsh Fusiliers, and Staff Captain of the 98th Infantry Brigade, 33rd Division. Appointed Puisne Judge of the Allahabad High Court in 1934 and Chief Justice of the Patna High Court in October 1938.

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CRITICISM OF THE HINDU WOMEN'S RIGHTS TO PROPERTY (FURTHER AMENDMENT) BILL.

by MR. B. D. KATHALAY, B.A. LL.B., *Pleader, Member of Delhi University Court, Nagpur.*

The bill introduced by the Honourable Mr. G. S. Motilal for further amending the Hindu Women's Rights to Property Act contains in another form some of the provisions contained in the bill introduced by Dr. Deshmukh, which were rejected by the Legislature when the Hindu Women's Rights to Property Act was passed. The reasons for the rejection of such provisions would hold good even now.

Clause 3 of the bill provides for conferring of the absolute rights on a Hindu woman, when she gets the property by inheritance, succession or partition. To confer absolute estate on the widow is to introduce the rules of Mahomedan law or the Succession Act in cases governed by Hindu law, without providing that the widow should not inherit more than four annas share or eight annas share in the property of her husband, as laid down in those laws.

According to Hindu law, the wife inherits as the surviving half of her husband, and she retains the estate as such. The effect of conferring absolute estate on the widow would be that she would be entitled to retain the estate, notwithstanding her remarriage. This is against the views of the Hindu community on this point and the clause would have the effect of overruling a bead-roll of cases in which it has been held that the widow forfeits her rights in the husband's property on account of her remarriage.

If the absolute estate is conferred upon a widow and she marries a man belonging to a different religion, she would not forfeit that estate. In some parts of India, where kidnapping of women is an every-day occurrence, the results would be more deplorable and the estate would go in the hands of the persons who kidnapped the woman.

A still more deplorable effect of conferring absolute estate on the widow would be to deprive the daughter of her husband of her right of inheritance. A man dies leaving behind him a widow and a daughter from a predeceased wife. According to the provisions of Hindu law on the point, the widow inherits the whole estate as a qualified estate, and after her death the daughter gets the estate. If the widow is allowed to get an absolute estate in her husband's property, and the widow marries, the second husband would be entitled to inherit the property, as it would be regarded as her stridhan. If she has children from her second husband, they would inherit the property and the daughter of the man would not be entitled to inherit the same under any circumstances.

The rights of the daughter's son of the deceased to inherit the property of his maternal grandfather would be also destroyed by this piece of legislation.

If absolute estate is conferred upon the widow, it would expose the widow to the schemes of plausible but unscrupulous persons, as pointed out by Russel, Acting Chief Justice of the Bombay High Court in 32 Bom 59[1] at pp. 75 and 76. An illustration of this observation is provided by the case in 41 Cal 870[2] at p. 875 where the widow gave all the property to a person who was an utter stranger to the family and who exercised appreciable influence on her. It may be noticed that immovable property, when given or devised by a husband to his wife, is never at her disposal even after his death. It is her stridhan so far as it passes to her heirs, not to his heirs. But, as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male even though the gift is made in terms which create a heritable estate: *see* Mayne's Hindu Law (1922) Edn. 9, p. 977, para. 664. The property inherited by the widow should not be of a better type, so that she could transfer it to anybody whom she likes.

The bill is intended to provide for the devolution of property, after it has devolved

1. Pandharinath v. Govind, (1885) 32 Bom 59= 9 Bom L R 1305.
2. Kulachandra Chakrawarti v. Bama Sundari Dasee, (1914) 1 A I R Cal 805=22 I C 701= 41 Cal 870.

on the widow and other female heirs. Suppose a Hindu dies leaving behind him a large fortune and a widow. The widow inherits the property and dies. Cl. 4, sub-cl. 3 of this bill provides that when the woman dies leaving no daughter or son of her own, it shall descend to her husband. When, ex hypothesi the woman is a widow, who has lost her husband, how is the property to devolve upon her husband, who died long ago? Probably the author of the bill means the new husband acquired by the widow under the provisions of the Hindu Widow's Remarriage Act (15 of 1856). O India! with what great wisdom thou art now governed.

The Explanation to Cl. 5 of the bill lays down that a Hindu governed by the Dayabhaga School of Hindu law shall not be deemed to have a joint interest in a Hindu family property for the purposes of this Act. But who said that he had such an interest?

This bill illustrates the observation to be found in Odger's Common Law of England (Edn. 10, 1911), Vol. 2, page 1452, about enactments passed in the dead of night by men, who as a rule, are ignorant of law.

On going through the Statement of Objects and Reasons of this bill, it becomes quite clear that the author of the bill has tried to make the worse appear to be the better reason. No person intending to inflict a great harm upon the rich classes in India, including of course the Marwadi Community, could have succeeded in inventing a better device than that to be found in the present bill. Gibbon in his 'Decline and Fall of the Roman Empire' has told us (Chapter 44, Para. 4, Everyman's Library Series, Vol. 4, p. 38) while dealing with the ideas of Roman Jurisprudence that a Lacrian, who proposed any new law stood forth in the assembly of the people with a cord round his neck and if the law was rejected, the innovator was instantly strangled. The constituency which elected the mover of the bill to represent it in the Council would take suitable action against him.

It is unnecessary to discuss the other provisions of this bill. The author of the bill has expressed in the Statement of Objects and Reasons that in several systems of law in European countries rights of women have been subsequently enlarged by legislation and that in view of the modern conditions of life, it is but just and equitable that the rights of Hindu women to property should be similarly changed by converting their limited interests into absolute ownership. He has not referred to any such provision of law in Notes on Clauses. He has deliberately refrained from putting any Notes on Clauses of the bill. He has convinced many persons about the extent of his knowledge of the present Hindu law as can be noticed from the provisions in this bill criticized above. If it were necessary, it would be possible to credit him with knowledge of the laws of all countries except his own. But that is not necessary. The principles of Hindu Jurisprudence regarding marriage and inheritance and many other topics differ entirely from the principles to be found in the jurisprudence of other countries. The introduction of foreign principles would be very much resented by the Hindus. The bill should be rejected.

Avyavaharika Debts of Hindu Law

by PANDIT THAKUR PRASAD DUBEY, M. A., LL. B.,
Munsif and Special Judge, Jaunpur.

There are few branches of Hindu law where judicial opinion is more sharply divided than on the point of the exact scope, import and limitations of Avyavaharika debts. The reasons that have led to this difference and sometimes to considerable confusion of even the standpoints of approach are not far to seek. Under the law of the land, the Indian Courts are bound to administer Hindu law on the basis of that law alone. That law is to be found in the texts of Sanskrit books of authority on law. Very few of us—the Judges and the lawyers—know that language and it is impossible for us to understand the rule of law embodied in those texts in its nascent spirit. When a question of Hindu law arises, we seldom get at the texts themselves on the basis of which alone we must in justice decide that question. The majority of us have not even once in life read even one single book or part thereof that contains the law. We do not even know where that law is, and the irony is that we yet honestly profess that we are administering Hindu law to Hindus. When the European Judges started administration of justice in this country under the East India Company, they decided questions of Hindu law on the advice of Hindu assessors. Those decisions in course of time became case-law when the system of assessorship was abolished and the Courts thereafter went on deciding cases on the basis of the precedents so far established and on the second hand knowledge of the law derived from translations of the originals. Under such a course of judicial history, Hindu law has quite naturally become considerably disfigured and mutilated. The same has happened with this particular rule of Hindu law. The matter does not rest only so far. As time passed on, even the translations of the texts became practically obsolete and the huge mass of the case-law itself self-contradictory and irreconcilable, became the only source of Hindu law for guidance of lawyers and Judges. The limit of irony was reached when after long lapse of time it was not even properly understood as to what is the Hindu law itself which Courts must administer, and before a Full Bench of the Madras High Court this doubt was elaborately mooted and canvassed and their Lordships were called upon to decide that point and they laid down that Hindu law is a set of rules contained in Sanskrit books of authority: *vide* A I R 1928 Mad 299.[1] That such a doubt should arise in the minds of those high authorities—members of the Bar and the Judges—who are day to day busy in that job itself shows how far away we have diverged from the mainspring of the law which has been given to us to administer.

The first source and the primary source of Hindu law for the Hindus is the Veda. As pointed out by Dr. Gnaganath Jha, a great modern orientalist, in the Introduction of his book "Hindu Law; In Its Sources":

> The law of the Hindus like everything else conducive to the welfare of man has its source in the revealed word of the Veda.

The Vedas are however a mass of huge literature scattered over a range not easily approachable or intelligible to ordinary scholars. The rishis therefore compiled what are known as Smritis which are nothing but the reproduction of the Vedas in simple and intelligible language. These Smritis are therefore the main practical source of Hindu law for law courts. Then followed in still later years series of commentaries on these Smritis themselves which in course of time became authorities in themselves. No harm however could be done to Hindu law so far. What has harmed the law has been the cause of the exclusive reliance of Judges upon the case-law alone unaided even by the Commentaries of the Smritis. The result has been what we every day find in the courts of law. The labyrinth and the mass of the case-law confront us with irreconcilable disharmonies and a Judge is not now allowed to go to the text himself and form his independent judgment for the fear of unsettling a point which rightly or wrongly is taken to have been settled. Innumerable instances can be multiplied to show that very great violence has been done to the true rule of Hindu law by many a decision of the highest tribunals of the land.

1. Movkha Kine v. Amma Kutti, (1928) 15 A I R Mad 299=108 I C 760=54 M L J 174=51 Mad 1 (F B).

Coming to the main subject under discussion, we have to note that the fundamental conception of the Hindu law is that the debt is not merely an obligation and a liability but a sin, the consequences of which follow a debtor in the next world. The Smritis both of Brihaspati and Narad lay down :

He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house a slave, a servant, a woman and a quadruped.

Under the Hindu law, the debt never dies with the death of the debtor nor does it get extinguished by lapse of time even if it remains unpaid till eternity. Hindu law lays down very elaborate and stringent provisions for the discharge of debts. It enjoins even the sons and the grandsons to pay their fathers' debt.

The son shall pay off his father's debts before paying his own (Brihaspati 11.48).

The son shall try his best to absolve his father from debt (Narad in Vivadratnakara, 54).

On the father's death, so long as his debt remains unpaid, the sons shall not receive his property and the son who inherits his property on his death shall pay the debt: Katyayana in Smritichandrika, 395. We may note in this connexion that all these provisions have been made to save the debtor's soul from the torments of hell or from the consequences that are to follow his non-payment in his life hereafter. This religious liability of the Hindu son is known as the pious obligation of the son to discharge his father's debts. The Hindu lawgivers engrafted an exception to this general rule of pious obligation to the effect that the sons are not liable to pay such of their fathers' debts as are illegal or immoral for the simple reason that if the incurring of the debt itself amounts to a sin, its payment will not avail and will not save the father's soul from the punishment consequent upon his act. The texts of Hindu law do not use these wide and vague expressions of illegal and immoral debts.

They have specified particular kinds of debts by name for the payment of which the sons are not made liable. The Smritis mention all these kinds of debts that are excepted, but some omit one or two and others add some few others. These exceptions are to be found in the Smritis of (1) Manu, (2) Brihaspati, (3) Ushana, (4) Gautam and (5) Vyas. The following nine kinds of debts have been enumerated in these Smritis that form the exception to the general rule of Hindu law: (1) Debts due for spiritous liquors, (2) debts due for lust, (3) debts due for gambling, (4) unpaid fines, (5) useless gifts or promises made without consideration or made under influence of lust or wrath, (6) unpaid tolls, (7) suretyship debts, (8) commercial debts and (9) avyavaharik debts.

I wish to add a few words on these debts as understood by Hindu jurists of old, for criticizm is generally levelled on the wisdom of the rule of these exceptions, and also on the rule of sons' pious obligations. In fact in a Full Bench case reported in 51 Mad 361,[2] the Hon. Coutts-Trotter C. J. of the Madras High Court went to the length of making the following observation on this subject: "The doctrine of pious obligation is an illogical relic of antiquity unsuited to any but a primitive and patriarchal society" and is not to be extended beyond the limits made binding by decisions of unquestionable authority. With all respect, this dictum of his Lordship is not acceptable to those who have made any fair study of Hindu jurisprudence. The remark of his Lordship was the subject of trenchant criticizm at the hands of Iqbal Ahmad and Kisch JJ. in a case reported in 1933 A L J 550[3] where their Lordships differed from that view in the most unequivocal terms. The Hon. Bajpai J. also disagreed with that view in the Full Bench case reported in 1934 A L J 483[4] at p. 502. The other Honourable Judges of that Full Bench followed the view of the Hon. Iqbal and Kisch JJ. and the Hon. Sulaiman C. J. in particular quoted that criticism with approval.

The Hindu believes that these rules of Smritis are reproductions from the memories of the rishis of the revealed words of the Vedas and it is one of the most fundamental beliefs of all Hindus that the Vedas are infallible. Jaimini long before 500 B. C. formulated in his Sutras the three propositions : (1) What is good for man can be learnt from the Vedas. (2) It can be learnt from the Vedas only and (3) Whatever the Vedas say must be true. This supreme authority of the Vedas is based upon their own eternal and immutable character and

2. Subramania Ayyar v. Sabapathi Ayyar, (1928) 15 A I R Mad 657=110 I C 141=51 Mad 361 =54 M L J 726 (F B).
3. Lalta Prasad v. Gajadhar Shukul, (1933) 20 A I R All 235=149 I C 181=55 All 283=1933 A L J 550.
4. Choten Lall v. Ganpat Rai, (1934) 21 A I R All 590=150 I C 411=1934 A L J 483 (F B).

upon the fact of their being the work of the Omniscient God.

Leaving however these religious beliefs aside and judging these rules on the standpoint of the modern notions of economy, sociology and politics, we find that the very results of the opposite view having been put into practice which are confronting the world to-day are in themselves sufficient vindication of the wisdom of those two rules. For what after all can be better conducive to the welfare of society and mankind in general than the prevalence of honesty, truth and security of contracts and transactions in society at large and what better method can be introduced to effect such results than of laying down rules and laws making debts and liabilities partake of nature of religious sins and terrifying masses with tortures of hell as consequences of non-discharges. By making the whole family, consisting of sons, grandsons and great-grandsons liable for the fair and just debts of the family fathers, the ancient law-givers enhanced the credit of the fathers in the market and made credit easy and approachable by the commonest of men. Under the rule of pious obligation the creditor had his debts secured by the liabilities of the entire family of sons and grandsons for all their fair and moral advances. The exception to that rule effected the other wholesome result that in cases of immoral debts the security for the debt was gone and such debts could not be made in society. That had the tendency to reduce crimes and sins. As against this, the Hindu jurists had laid down the rule of damdupat as a check on the caprices of unscrupulous creditors. Society has had a very smooth run in this country till very late. But the impact of the West has of late dethroned the ancient law from its right place and introduced in society at large the dishonest trickeries in the forms of the so-called protective and unnatural laws which are being administered these days in our law Courts. The results of this change has caused moral havoc and that has penetrated the most obscure recesses of rural areas even. An illiterate villager staggered at the idea of defeating his creditor, for he had his well engrained notions of smritis and had the terror of the punishments. Such men could not say a word of untruth in a Court of law. Even now we do come across such stray figures in Courts. They are those who have not yet imbibed the full effects of these modern changes in conceptions of debts. These are however matters that can form suitable chapters in history of social dynamics than of legal jurisprudence.

The other objection is that the nine exceptions are all archaic and out of tune and time. The whole trouble is that we do not know the subject and yet poke our nose and criticize all that is old. The first three kinds of debts prohibited are those that arise from the intoxicating drinks, lusts and gamblings. Who on earth will support the morality or the legality of such debts even now? Are these evils now not on tremendous increase and is society not groaning under their weight? Is there not even greater necessity of enforcing that rule now than even in older days? The fourth is the debt due on fines and they are clearly of criminal origin and must be suppressed. The fifth is the clearest kind of bad and immoral debt. The sixth is the unpaid toll or tax. The Sanskrit word used for this debt is 'shulka' which is always used in the sense of a bad liability. Haradatta, a Commentator on Gautam, has explained it as "Bride price." Such a debt is also an immoral debt. The seventh is the surety money and that debt is also in its very nature one based on personal volunteering and is not a good debt from the family point of view. The eighth one is commercial debt. The Sanskrit word for it is 'banikshulkam' and is translated by Dr. Jha as trade duties. I have observed above that shulka is always used in a bad sense.

The ninth is the 'avyavaharika' debt and this subject forms the main theme of my present discussion. On account of the great importance of the subject I shall quote the actual text which deals with it:

दण्डो वा दण्डशेषो वा शुल्कं तच्छेष एव वा ।
न दातव्यं तु पुत्रेण यच्च न व्यावहारिकम् ॥

(Vyas in Vivadratnakar). The same is quoted from Ushanas in Apararka, p. 648 and Mitakshara, p. 47.

The expression 'avyavaharika' as used in the Smritis has been the subject of interpretation by many a commentator of Smritis of high authority. Apararka, Smritichandrika and Virmitrodaya explain it as "what is not proper." Balambhatt explains it as "what was not used for the family." Vivadchintamani explains it as "what is not admissible under normal conditions or what is not admissible in law." Dr. Ganganath Jha adopts "what is not proper" as its proper meaning: *vide* Hindu

Law In Its Sources, Vol. 1, p. 208. The word 'vyavahara' or 'avyavahara' though Sankrit in its origin is of very common use in every-day parlance and its exact meaning as commonly understood does not admit of much controversy. Avyavaharik is against 'vyavahara' On the plain interpretation as put by Hindu commentators of high authority the expression means an improper debt. But when this expression became the subject-matter of interpretation by Judges it became the subject matter of irreconcilable conflicts. One view is that any lapse from right conduct is avyavaharika. The other view is that in order to form an exception to the general rule of pious obligation, a debt must be the outcome of an act criminal in its nature or very near it. Ordinary dishonesty or immorality will not do. The former interpretation is well in keeping with the ordinary meaning of the word avyavaharika itself and is one accepted by the Hindu scholars.

Let us now come to modern judicial interpretations of the term. The famous Hindu Judge and Scholar, Chandavarkar J., with Knight J. held that a Hindu son is not liable under the texts for debts which the father ought not as a decent and respectable man to have incurred and the sons are not answerable for the debts attributable to his father's follies, failings and caprices: 32 Bom 348.[5] This view was accepted by Wallis C. J. in 44 Mad 214,[6] but it has not been followed in a hoard of other cases. Judged on the plain language of the text itself and on the interpretation put by authentic commentators and supported as it is even by a modern Hindu scholar like Dr. Jha referred to above, and by other Hon. Judges to be presently noted, this Bombay view is the most correct one. In another Bombay case reported in 43 Bom 612[7] at p. 624, this expression was interpreted as "not usual; not customary" and that is also very near the former view of that Court. Colebrooke translates it as "a debt incurred for a cause repugnant to good morals." In a well-discussed and too often quoted case of the Calcutta High Court reported in 39 Cal 862[8] the Hon. Mookerji J. defines it as :

> Debts that are not lawful, usual or customary, or if we accept the version of Colebrooke debts for a cause repugnant to good morals.

This view is also very near the view of the Hon. Chandavarkar J. when taken in the abstract. In another well-discussed case of the Madras High Court reported in A I R 1925 Mad 841[9] their Lordships, Venkatasubba Rao and Madhavan Nair JJ., observed as follows :

> It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals or is grossly unjust or flagrantly dishonest.

There cannot be the slightest doubt that the preponderance of judicial opinion by an overwhelming majority is in favour of the rule that such debts mean criminal or sinful debts and not such as arise from ordinary failings or follies of the father. Such authorities are very large in number and need not be cited.

In my humble opinion, this view is not in conformity with the true spirit of the texts and I am supported in my view by equally high authorities. We have to bear in mind that in nearly all these decisions very little attention was paid to the wording of the texts and reliance was placed on earlier decisions which in their turn were based on still earlier decisions of similar type. The following position in support of my view looks practically impregnable. The sole question for determination is whether a particular debt is vyavaharika or avyavaharika, and the word avyavahara is a very common word and is understood even by a man in the street. Its common and natural meaning is "what is not proper," a meaning adopted by such high authorities as Apararka and Smritichandrika and by Dr. Jha. The same has been the view of the Honourable Chandavarkar and Knight JJ. and of Wallis C. J. of the Madras High Court. This much is however absolutely certain that on the plain meaning of the word 'avyavaharika' it is impossible to hold it to mean "immoral and illegal" or as "grossly unjust and flagrantly dishonest" or as "one infected with criminality" as has been held in some

5. Durbar Khachar v. Khachar Harsur, (1908) 32 Bom 348 = 10 Bom L R 297.
6. Venkatacharyulu v. Mohana Panda, (1921) 8 A I R Mad 407 = 61 I C 530=44 Mad 214 = 39 M L J 586.
7. Hanmant Kashinath v. Ganesh Annaji, (1918) 5 A I R Bom 13=51 I C 612=43 Bom 612 = 21 Bom L R 435.
8. Chakouri Mahton v. Ganga Prasad, (1912) 39 Cal 862 = 12 I C 609 = 15 C L J 228 = 16 C W N 519.
9. Ramasubramania Pillai v. Sivakamiammal, (1925) 12 A I R Mad 841 = 90 I C 165.

cases. Avyavaharika means not vyavaharika and vyavaharika means usual, normal and customary dealings in society. Is it a normal or customary dealing to act dishonestly with regard to the moneys of others or to take or continue in illegal possession of others property or to cut away or remove others trees or crops or to commit tort or other breaches of civil duties ? The answer must be emphatically in the negative unless we assume the existence of a society where such acts are not considered undesirable. Who will consider such acts as normal acts of a normal man in society ? Judged on this standard, every decree for mesne profits, every decree for damages for torts or other breaches of civil duties must be avyavaharika and to my mind there is no escape from such a position if the text is adhered to. I am very much fortified in my view by the three latest Division Bench decisions of Allahabad High Court. In my opinion their Lordships in these cases took just that attitude which a Judge is bound to take in handling a Hindu law case. Their Lordships took hold of the text itself and based their findings essentially on the basis of the same and the result has been that their decisions fit in with the logic of facts mentioned above. Hon. Thom and Bajpai JJ. have observed as follows in a case reported in A I R 1938 All 263[10] :

> No hard and fast rule can be laid down and the Courts have got to look at each debt and the circumstances in which it arises in order to find out whether it is vyavaharika or avyavaharika. In the case of a decretal debt like a decree for damages the act which is the foundation of the suit for damages has got to be scrutinized and one has got to see whether the act was a vyavaharika act or avyavaharika act.

They further observed :

> The act of a person in bringing a malicious complaint without reasonable and probable cause is a tortuous act opposed to public policy or decent vyavahara and as such an avyavaharika act and a pecuniary liability arising therefrom in the form of a decree for damages for malicious prosecution is not binding on his sons or grandsons.

Their Lordships arrived at the decision simply on the basis of determining whether on the facts of a case the debt is avyavaharika untrammelled by decisions based without reference to the text. In another case the Honourable Bajpai and Collister JJ. took the same view of the law and followed the aforesaid case and the dictum thereof : *vide* A I R 1938 All 377.[11] In this case their Lordships definitely laid down that an act is avyavaharika only if it is repugnant to good morals and it is not at all necessary that it should be a criminal act before it can be said to be avyavaharika : p. 382. The same view was again taken in a case reported in 1938 A L J 919[12] which followed the aforesaid two decisions, by the Hon. Bennet and Verma JJ. Their Lordships observed as follows in that case :

> . . . . the conduct of *D* which has resulted in the said liability was repugnant to good morals and the debt therefore was an avyavaharika debt and was not binding on the sons. The fact that the wrongful act of *D*, in consequence of which the decree was passed against him, was of a civil nature did not make any difference.

It was argued in this case that taint of criminal element is absolutely necessary in an act before it can be stamped as avyavaharika and reliance was placed on the long series of earlier decisions that had taken this view. Their Lordships in this case disagreed with that view.

On this point even Hon. Venkatasubba Rao J., who took a contrary view in the case reported in A I R 1925 Mad 841[9] observed as follows :

> In my opinion the distinction between a crime and a breach of civil duty in this context is extremely artificial and finds no support in the texts of the Hindu law : page 844.

The former abovementioned observations and the view held in that case therefore cannot be good law for reasons given above.

To sum up therefore the correct rule of law appears to me to be that avyavaharika debt means "what is not proper" or "what is repugnant to good morals or a debt which a father ought not as a decent and respectable man to have incurred." It will be a question for decision in each case on its own peculiarities if a particular debt comes within the aforesaid definition. It is absolutely a wrong proposition to say that it is necessary that the act be criminal before it can be avyavaharika.

Another important point to be noted in this connexion is that Hindu law has specified nine kinds of debts by name which form an exception and for which the sons are not liable and this one is one of them. Out of the nine, Nos. 4 to 8, are such as it would be impossible to say that they are even immoral or illegal. It will not at all

10. Raghunandan Sahu v. Badri Teli, (1938) 25 A I R All 263=175 I C 607=I L R (1938) All 330=1938 A L J 268.

11. Brij Behari Lal v. Phuni Lal, (1938) 25 A I R All 377=176 I C 376=1938 A L J 470.

12. Hem Raj v. Khem Chand, (1938) 25 A I R All 601=1938 A L J 919.

be possible to call them criminal. They are at the most bad or undesirable debts. If you cannot add criminal element in these five debts it looks inconceivable how or on what logic we can add that element as necessary ingredient for the last one.

The whole mischief is the outcome of the method of the administration of Hindu law whereunder we decide a point on Hindu law very seldom on the basis of the texts and practically always on the decisions already made which in their turn suffer from the same defect. The law of stare decisis does come in and tie our hands to persist in perpetuating wrong and incorrect decisions for the fear of unsettling that which by a long course of decisions has been settled. It is also a fact that our Judges and lawyers are seldom men who are well versed in Hindu law in its origin and are students of second hand knowledge in that branch. These are the handicaps that are there and cannot be helped; but in spite of it all, much, if so desired, in right quarters, can be done to check the onward rush of digression towards further mutilation and annihilation of the ancient Hindu law which it is the duty of those who hold the reins of the administration of justice in this country to uphold.

EXTRACTS FROM CONTEMPORARIES

An Outsider's View As To What Happens In a Jury Room

The jury files solemnly out of the Court room followed by the Court bailiff who has hurried in from the Court library where he has been talking politics with several attorneys not interested in the case.

One of the jurors—addressing the others —said : "Well, boys, we will have to elect a foreman, and as our friend Jones here was able to keep awake all through the case, I move that he acts as foreman." This is taken by consent and Bill Jones is elected foreman.

Another juror — "When do we eat ?"

Foreman — "Wait a minute, boys, we will have to take a ballot first."

The balloting proceeds and the result is that ten jurors vote for a verdict of guilty and two, not guilty, the charge being one of petit larceny for stealing chickens.

The red-faced juror renews his question as to when they eat and his inquiry is supported by several other jurors, who get into a discussion as to which restaurant serves the best meals and whether a juror has any right to ask for a second piece of pie. This discussion takes up half an hour and then a rap at the door brings the announcement that the bailiff is going to take the jury to dinner.

The jury always goes to dinner in style, marching two by two escorted by the bailiff who has trouble of keeping some of the stragglers in line, and during the march to the eating place, the bailiff in the meantime walks with the most talkative juror and tries to find out how the jury stands on the case. Of course the jurors are not supposed to talk about the case with the bailiff, and the outsider giving his views here does not mean to insinuate that this does happen, but such a conversation as this might take place :

Bailiff — "Well, Bob, are we going to have a night session, and will you want me to call up any of your women folks ?"

Talkative Juror — "Hell, no if we didn't have two contrary cusses on here, we would be out in ten minutes."

So the bailiff says nothing, but has a well-grounded opinion that the jury stands ten to two.

At the restaurant, the jurors all sit at a large table: but the bailiff says he is on a diet and eats at the lunch counter. However, he seems to be more interested in the good-looking waitress than in the lunch.

Back in their jury room, the men settle down for a careful consideration of the case. One juror demands another ballot, which develops the extraordinary fact that the dinner has changed the opinion of one juror, and it now stands nine for guilty and three for not guilty.

Now the following takes place : One of the jurors—"Say, boys, did you see that pretty blonde sitting just inside the railing? I believe I've seen her before some place."

This is cut off by the foreman who says they will have to discuss the case, and then follows a heated discussion as to whether or not the prosecuting witness should be believed, because he said the chickens stolen were Plymouth Rocks and one of the other witnesses said they were Leghorns. This discussion was interrupted by one of the jurors who asked — "Did you

boys ever hear the story about the travelling man and the red-haired lady?" Another juror insisted that they vote again, but the foreman said that after their discussion a story wouldn't go bad, so the juror told his story which no doubt would not have been passed by any board of censorship, but it went over big, and a vote being taken, it developed that either the discussion or the story had changed the minds of two of the jurors and the vote stood — guilty eleven, not guilty one.

Now follows a discussion as to the meaning of some of the Court's instructions, one juror insisting, and backing it up with some argument, that several of the Court's instructions were contradictory, and that according to one which said something about the constitution, that the jurors didn't have to pay any attention to them anyway, one juror insisted that the Judge had fallen asleep during one of the attorney's speeches, but this was frowned upon by several other of the jurors who had taken cat-naps themselves, and they took the position that the Judge was entitled to a short nap as long as he looked dignified and appeared to be reading a book.

Another ballot is taken which still shows eleven for guilty and one for acquittal, and the jurors look suspiciously toward a pick-up juror in the corner who hasn't joined in the discussion, and it is openly charged that someone is attempting to hold the jury after midnight to get an extra day's fee. This, of course, is indignantly denied and then two of the jurors want the Judge to be called back and have him re-read the instructions. Now the foreman leaves the room and talks to the bailiff about calling the Judge back and having him re-read the instructions, but on learning from the bailiff that all the attorneys and the defendant would have to be rounded up before the Judge could re-read the instructions, the foreman goes back to the jury room and demands of the hold-out juror on what evidence he is basing his opinion of not guilty, and it develops that this juror believes that it was a physical impossibility to steal the chickens without their squawking loud enough to attract the owner, and, besides this, the attorney for the defendant was a friend of his and if he decided against him, he would not let him sit on any more juries. These views, of course, brought forth a vigorous discussion which broadened out so as to cover not only the case, but important political questions as well, also whether certain of the court attaches were married or not, and finally whether the corn borer was a menace or a friend of the farmer by keeping down production.

It is now two minutes past midnight and with another day safely under his belt, the weary pick-up now demands a vote, which stands twelve for guilty, and the verdict is duly signed, sealed and delivered in open court at 9 o'clock, A. M., the following day. And homeward plods the weary juror with a sense of satisfaction in a duty well done. —*Case and Comment.*

RIGHTS OF THE RAILWAY PASSENGER

Although anyone fated to travel during "rush hours" may, with some justification, be inclined to abandon all aspirations outside the stern doctrine of the survival of the fittest, he may, during moments of lesser stress, derive some spiritual comfort from the recollection that once he has taken his ticket, a definite contractual relation is set up between him and the carrying company. To what extent this happy state of affairs may be said to entitle him to any degree of bodily comfort or well being however is a matter which has on several occasions occupied the attention of the Courts, and on which we propose to review some of the principal decisions. To begin with, it may be noted that the Railway and Canal Traffic Act, 1854, after including him with "goods, animals and other things conveyed by any railway company" in a preliminary definition of "traffic," declares that every railway company "shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic . . . so that all reasonable accommodation may . . . be at all times afforded to the public in that behalf."

From the position so outlined (obligation to provide reasonable accommodation) to that of maintaining that a railway company, by permitting overcrowding, is guilty of negligence, is no very long stretch; and so indeed it has been held by the Courts.

"In the present case," said Lord Cairns in (1877) 3 A C 193[1] at page 198,

there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower Street Station : and it may also have been negligence, if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have removed them.

And since negligence breeds liability, it follows that in the event of a passenger suffering any injury as the result of overcrowding permitted through the company's negligence, the company may be held responsible. To bring such liability home against the company, however it is essential that the passenger should prove that the injury was received as the direct result of the overcrowding, and of course, that he should not have contributed to it by any negligence of his own. And human nature, or rather the nature of railway travel, being what it is, it is on one or other of these two points that actions brought by passengers generally fail.

Thus, in the case cited above, the carriage, in which *J*, the passenger, was riding, was full. At Gower Street, three persons forced themselves in, and were obliged to stand. There was no evidence that a complaint on this matter had been made to the railway officials, or that they knew of the fact. At Portland Road some other persons opened the door of the carriage, shut it again and went away. There was, afterwards, a rush on the platform, and other persons opened the door of the carriage. *J* stood up to prevent their entering; the train moved; *J*, to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door, in doing which *J's* thumb was caught and crushed. Held, that this evidence did not establish such negligence on the part of the company as could be said to have occasioned the mischief, although, in the words of Lord Cairns :

If when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made a matter of evidence.

In connexion with this comment, it is interesting to recall the following statement made a few years before by Lord Cockburn in his judgment in (1873) 8 Q B 161[2] :

It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience.

The necessity for proving that the injury was directly caused through the company's negligence is well illustrated in (1892) 1 Q B 385[3] and (1894) A C 419.[4] In the former the plaintiff was assaulted at each station at which the train stopped by relays of pitmen whose ill-well he had incurred and who "crowded into the compartment in which he was, thereby greatly overcrowding it." Although when he took his ticket the defendant's servants had no notice that he was exposed to greater danger than one of the ordinary travelling public, he was threatened with violence in the hearing of some of them before the train started, and, having got into the guard's van for safety, was removed and placed in a third class carriage by the defendants' servants. At each station he complained of the assaults to the guard, who did nothing to secure his safety. In the course of his judgment in favour of the defendant company, A. L. Smith L. J. (afterwards M. R.) stated :

If the carrier omits to perform either of these duties (i. e. to carry the passenger with due care and afford him reasonable accommodation), he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of any unknown peculiarity attaching to him.

In the second case the plaintiff, who claimed that the defendant company was "negligent in permitting the said carriage to be overcrowded and so facilitating the hustling and robbing of the plaintiff," failed on the ground, as stated by the Earl of Selborne, "that on the plaintiff's pleading, it is not shown that the overcrowding of the carriage did in fact conduce in any way, directly or indirectly, to the robbery; and on the assumption that, under some

1. Metropolitan Railway Co. v. Jackson, (1877) 3 A C 193=47 L J C P 303= 37 L T 679=26 W R 175.

2. Gee v. Metropolitan Railway Co., (1873) 8 Q B 161=42 L J Q B 105=28 L T 282=21 W R 584.

3. Pounder v. North-Eastern Railway Co., (1892), 1 Q B 385=61 L J Q B 136=65 L T 679= 40 W R 189=56 J P 247.

4. Cobb v. G. W. Ry. Co., (1894) A C 419 = 63 L J Q B 629=6 R 203=71 L T 161=58 J P 636.

possible circumstances, this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connexion, between the overcrowding and the loss. It is not, in my opinion, enough to suggest (as the plaintiff does) that to suffer such overcrowding was "to facilitate the hustling and robbing of the plaintiff."

As for the practice of allowing third class passengers to crowd into first class compartments, it is perhaps rather a confirmation of the pacific nature of the British travelling public, and possibly of official tact, than a tribute to existing conditions, that the only recorded case of this kind occurred during the war. In (1918) 34 T L R 467[5] the plaintiff, who had taken a first class ticket, was travelling in a first class compartment arranged to accommodate five persons. At an intermediate station, there was a large number of persons on the platform, and one of the railway company's servants having cried out, "Get in anywhere you can," several persons who were third class passengers got in, so that altogether there were twelve persons in the compartment. The plaintiff, who said he had been subjected to inconvenience by being squeezed up in his seat and also by having persons standing up in front of him, claimed 4s. 6d. damages—the difference between the third and first class fares, on the ground that the company had broken its contract with him by not providing him with proper accommodation. In upholding the finding of the county Court Judge that, "although in normal times the plaintiff might succeed, yet the passenger's contract must be affected by existing conditions of railway travel, and by the inability of the companies, owing to Government action, to give, at all times, the previous accommodation," Avory J. declared :

> The county Court Judge was right. His judgment was a correct statement of the company's contractual obligation both under normal conditions and under existing conditions.

In the light of these cases, it would appear that, granted the privilege of what he has doubtless come to recognise as "normal conditions" and (or) of some directly caused injury, the circumspect "rush hour" passenger does enjoy some little place in the law, even if not in the train.—*The Law Times.*

5. Jones v. G. N. Ry. Co., (1918) 34 T L R 467.

SUSPECTED PERSONS

It would be unfortunate if a police officer having a person under suspicion as an intending thief could not effect an arrest until a felony was actually being committed. On the other hand, it would equally be unfortunate if an honest man who happened to be standing about in a public highway could lawfully be arrested as a suspected felon. The circumstances under which persons suspected of a felonious intention can be arrested are laid down in Ss. 4 and 6, Vagrancy Act, 1824. S. 4 of that Act, as amended by S. 7, Penal Servitude Act, 1891, provides that :

> Every suspected person or reputed thief frequenting . . . . any street or highway or any place adjacent to a street or highway with intent to commit felony or loitering thereabout or therein . . . . shall be deemed to be a rogue and vagabond.

By Sec. 6 there is power to arrest any person found offending against the Act. It will be recollected that a short time ago the Court of Appeal had to consider the meaning of "suspected person" in (1936) 3 All E R 570.[1] This was an action by two men against police officers for damages for false imprisonment. The pleaded defence alleged that one of the plaintiffs was seen to go inside a telephone kiosk and remain there for about 25 minutes, whilst the other waited outside. The man inside did not appear to make any call, but appeared to be attempting to tamper with the coin container. As the police officers approached the kiosk, the man outside kicked the door and the man inside began to make a call. Both plaintiffs were arrested, but after being detained for some hours were allowed to go. The action was by consent tried upon the pleadings on the basis that the defendants would be in a position to prove the defence pleaded, and damages were awarded to the plaintiffs. Before the Court of Appeal it was argued that as the police officers suspected the plaintiffs were attempting to commit a felony, the plaintiffs had offended against S. 4, Vagrancy

1. Ledwith v. Roberts, (1936) 3 All E R 570.

Act, 1824. The Court of Appeal held that a person could not be arrested for loitering with intent to commit felony merely because he was suspected of being about to commit felony, but he must antecedently by his conduct have brought himself within the category of a suspected person or reputed thief.

The defence had relied upon the decision of the Divisional Court in (1917) 117 L T 304.[2] In that case a person was kept under observation for 40 minutes, and was seen on seven different occasions in different parts of the city of Birmingham to be tapping the pockets of persons seeking to board tramcars. The Justices had held that as there was no evidence that the prisoner had previously borne a bad character, he was not a suspected person or reputed thief. The Divisional Court sent the case back to the Justices with a direction that there was evidence from the prisoner's conduct that he was at the time of his arrest a suspected person. In the Court of Appeal in (1936) 3 All E R 570,[1] Greer L. J. held that (1917) 117 L T 304[2] was rightly decided, but was distinguishable, because on more than one occasion before his arrest the prisoner had been acting in a suspicious manner, whereas the incident relied on in (1936) 3 All E R 570[1] as having rendered the plaintiffs suspected persons was one and the same as that for which they were arrested. The other Lords Justices, whilst agreeing that (1917) 117 L T 304[2] was distinguishable expressed the opinion that it had been wrongly decided. Recently in (1938) 1 All E R 11[3] the Divisional Court was required to consider whether, in view of (1936) 3 All E R 570[1] the decision in (1917) 117 L T 304[2] must be regarded as no longer law. In the present case a person was kept under observation for nearly two hours, during which time he was seen to be attempting to open the doors of parked cars. He was eventually arrested, and charged under Sec. 4, Vagrancy Act, 1824. The learned stipendiary Magistrate before whom he was brought decided that he could not convict, because (1917) 117 L T 304[2] had been overruled, and it was now the law that there must be an interval of time between becoming a suspected person and being arrested with the status of such a person; and that in the present case the evidence of the accused being a suspected person and his being found loitering were so interconnected that there could not be said to be evidence that he had already acquired the status of a suspected person when arrested.

On a case stated, the Divisional Court (Lord Hewart, L. C. J., Branson and du Parcq JJ.) laid down that (1917) 117 L T 304[2] still afforded a safe guide to Magistrates in this type of case. We welcome this decision, for (1936) 3 All E R 570[1] was being variously interpreted. If it was correct that there had to be an interval between a person having become a "suspected person" and the effecting of an arrest for loitering with intent, much of the efficacy of S. 4, Vagrancy Act, 1824, would have been lost. For, if the police had to wait until the suspected person resumed his suspicious conduct on a different occasion the intended crime might take place in the interval. On the other hand, the Divisional Court has not in any way purported to diminish the effect of the decision in (1936) 3 All E R 570[1] that an arrest cannot be effected under this Section as soon as the police suspect a person of intending to commit a felony. Further, in delivering judgment in the present case, Lord Hewart pointed out that the "suspected person" must be found "loitering," or "frequenting," and that continuous or repeated acts were necessary to support such a charge.—*The Law Journal.*

2. Hartley v. Ellnor, (1917) 117 L T 304 = 86 L J K B 938=81 J P 201=15 L G R 775=26 Cox C C 10.
3. Rawlings v. Smith, (1938) 1 All E R 11.

LIFE ASSURANCE AND PUBLIC POLICY

Public policy, a doctrine which was thought to be passing into a limbo of legal heresies, has been revived in the last two years by various affairs of matrimony, cigarette selling, and sudden death; and now one of the most important propositions which go to constitute the doctrine has been conjured before the law lords in order to have its i's dotted and its t's crossed in perpetuity.

The Courts will not recognize a benefit accruing to a criminal from his crime. That is the rule now affirmed in (1938) 2 All E R 602.[1] In the language of Lord Atkin,

1. Beresford v. Royal Insurance Co., (1938) 2 All E R 602.

the rule is an absolute one. That is to say that the Court will not generalize it nor inquire as to the tendency of any particular transaction to encourage the commission of crime. The absolute nature of the rule is well illustrated in (1938) 2 All E R 602[1] the facts of which are well known to readers (*see* 83 Law Jour 248). The gentleman who committed suicide while in full possession of his faculties in order to prevent the lapse of his life policy for non-payment of premium was doing an act which, whatever be the virtues or vices implied in suicide, is not the subject-matter of facile imitation. Therefore so far as meritorious tendencies are concerned, there was nothing to choose between the appellants, who relied on the sanctity of contract, and the respondents who repudiated because of the crime.

Indeed in their interpretation of the contract the law lords adopted the arguments of the appellant. The clause which made the policy void "if the assured should die by his own hand, whether sane or insane, within one year from the commencement of the assurance" implied that the respondents intended to pay in the event of a sane or felonious suicide taking place after the expiration of one year. The phrase "sane or insane" was not merely a clumsy way of saying "even if insane." The law lords did not however treat that clause as vitiating the entire policy. The clause was severable ; so too was any part of its meaning which contemplated the rewarding of a crime. Moreover, the doctrine stated by Lord Atkin does not relate to the legality or illegality of the contract, but to the powers of the Court in relation to the performance of contract. The Court will not allow a criminal to benefit from his crime. That is a narrower statement than the statement of Greer L. J. in (1933) 1 K B 822,[2] and adopted by Lord Wright M. R. in (1937) 2 All E R 255,[3] that "in this country no person is allowed to insure himself against the commission of a crime."

In this case the law lords, following a line of cases such as (1911) L R P 108,[4] arising out of murder (from which suicide is hardly different), have held, it may be inferred, that there is a power inhering in the Court to prevent the rewarding of crime; this is quite apart from the legality or otherwise of the contract. Apparently this is not a matter of pleading, but is a principle inhering in the jurisdiction. On this principle it is suggested, the arsonist cannot recover under his policy of fire insurance. If this be the principle, then clearly there is room for a distinction between the criminal and the innocent assignees of a criminal. On this point the judgments of the law lords are explicit.

The personal representative of a criminal is in no better position than the criminal himself. His root of title is identical with that of the criminal. An innocent assignee for value however whose interest arose before the crime, may be in a different position. Although, theoretically, he should have no better right than that of his assignor, it is to be inferred from dicta of Lord Atkin that in a proper case the law will protect him as it protects the bona fide purchaser for value (*Quære :* If his interest arise after a crime of which he is ignorant). In this connexion, Lord Atkin approves what now appears to have been the decision in the ill-reported case in 4 El & Bl 243[5] (*see* 82 Law Jour 27.) Presumably the harsh but authoritative decision in (1830) 4 Bligh N S 194[6] is distinguishable. If here there is a perceptible change, it is not without parallel in other departments of the law.—*The Law Journal.*

2. Haseldine v. Hosken, (1933) 1 K B 822=102 L J K B 441=1933 W C & I Rep 225=148 L T 510=49 T L R 254=45 Ll L Rep 59.

3. Beresford v. Royal Insurance Co., (1937) 2 All E R at p. 255.

4. Re Crippen, (1911) L R P 108=80 L J 47 = 104 L T 224=55 S J 273=27 T L R 258.

5. Moore v. Woolsey, (1854) 4 El & Bl 243=3 C L R 207=24 L J Q B 40=1 Jur (N S) 468 =3 W R 66=119 E R 93.

6. Amicable Society v. Bolland, (1830) 4 Bligh (N S) 194=2 Dow & Cl 1=33 R R 22.

Reviews

Law of Partnership, by CHAUDHARI TIRATH DAS SEHGAL, B.A. (HONS.), LL.B., *Lahore.* Published by the Lahore Law Times Press, 18, Rabbani Road, Lahore. Pages over 500. Price Rs. 5.

This book appears to be one of the latest commentaries on the Indian Partnership Act. The notes to the Sections are critical as well as explanatory. Differences between the Indian law and English law have been explained. The Comparative Table of Sections of the Indian Partnership Act, 1932, the English Partnership Act, 1890 and the Indian Contract Act, 1872, Chap. XI given in the beginning will be found very useful. The appendices also give much useful information. The case-law has been brought up-to-date. The book is bound to be useful to the Bench and the Bar.

The Cantonments Act 2 of 1924 and the Cantonments (House-Accommodation) Act 6 of 1923, by Jagan Nath Puri, B.A., LL.B., Advocate and Legal Adviser, Cantonment Board, Ferozepore. Published by the Law Publishing House, Ferozepore City. Pages over 800. Price Rs. 11-8-0.

This treatise contains the entire law relating to the administration of Cantonments in that the author has given not merely the Cantonment Act as modified by later enactments but also all orders and rules framed by the Central and Local Governments. The notes to the Sections of the Cantonments Act are clear and exhaustive with reference to case-law wherever possible; and where there are no direct rulings under the Act itself, he has included rulings from other cognate laws. Thus the author has spared no pains to make the book as useful as possible. The book is bound to be highly useful to the Bench and the Bar and to every one interested with this branch of the law. The printing and get-up are good.

END

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	19 P L T 222
	1938-1 M L J 785
	I L R 1938 A 326
	67 C L J 176
	1938 M W N 573
	4 B R 305
	1938 P W N 466
	65 I A 132
	32 S L R 383
	40 B L R 752
67	173 I C 15
	19 P L T 125
	47 M L W 231
	1938 O L R 119
	1938 A L J 169
	1938 All L R 167
	1938 A W R 52
	1938 O W N 261
	1938-1 M L J 640
	65 I A 66
	1938 P W N 360
	67 C L J 153
	4 B R 374
	1938 M W N 646
	ILR 1938-2 C 72
	42 C W N 985
	32 S L R 374
	40 B L R 746
71	172 I C 985
	1938 O L R 92
	47 M L W 221
	1938 O W N 253
	1938 All L R 126
	1938 A W R 37

AIR	Other Journals
71	40 P L R 253
	4 B R 312
	1938 M W N 618
	32 S L R 383
	40 B L R 755
73	172 I C 993
	47 M L W 239
	1938 O L R 104
	1938 O W N 215
	I L R 1938 L 63
	1938 A L J 194
	1938 All L R 138
	1938 A W R 74
	66 C L J 524
	40 P L R 247
	65 I A 106
	4 B R 317
	1938 M W N 621
	42 C W N 930
	40 B L R 724
	1938 P W N 548
	32 S L R 350
	1938-1 M L J 359
77	172 I C 1004
	1938 O W N 196
	1938 O L R 110
	1938 A L J 190
	1938 All L R 144
	1933 A W R 56
	40 P L R 180
	1938 R D 399
	4 B R 353
	32 S L R 395
	40 B L R 742
80	1938 A L J 141
	1938 A W R 32
	42 C W N 353
	47 M L W 227
	173 I C 1
	1938 O L R 112
	1938 O W N 233
	1938 All L R 148
	1938 P W N 170
	1938-1 M L J 458
	65 I A 119
	19 P L T 215
	66 C L J 548
	I L R 1938 A 314
	4 B R 358
	1938 M W N 626
	32 S L R 362
	40 B L R 735
84	172 I C 988
	1938 A L J 138
	1938 O L R 95
	1938 O W N 167
	1938 All L R 134
	1938-1 M L J 849
	67 C L J 118
	47 M L W 796
	4 B R 322
	1938 A W R 43
	40 B L R 731
87	1938 O W N 90
	172 I C 981
	1938 O L R 83
	1938 All L R 115
	4 B R 295
	32 S L R 340
91	173 I C 19
	1938 A L J 179

AIR	Other Journals
91	1938 A W R 79
	47 M L W 409
	1938 P W N 274
98	1938 O W N 139
	42 C W N 385
	1938 A L J 200
	1938 All L R 175
	1938 A W R 67
	1938 O L R 127
	173 I C 412
	4 B R 365
	32 S L R 401
	40 B L R 760
103	1939 M W N 85
110	1938 O W N 299
	1938 A W R 59
	1938 A L J 264
	1938 O L R 159
	173 I C 612
	1938 All L R 220
	1938 M W N 390
	47 M L W 649
	1938 P W N 436
	4 B R 408
	32 S L R 426
113	1938 O W N 268
	1938 O L R 137
	1938 A L J 301
	173 I C 625
	1938 All L R 209
	1938 A W R 109
	1938-1 M L J 731
	67 C L J 62
	4 B R 394
	65 I A 137
	32 S L R 433
118	1938 O L R 175
	1938 A L J 261
	1938 A W R 87
	42 C W N 537
	1938 P W N 262
	1938 I T R 206
	4 B R 472
	1938 M W N 401
	47 M L W 614
	19 P L T 290
	1938 O W N 385
	1938 All L R 247
	1938-1 M L J 704
	67 C L J 101
	65 I A 150
	32 S L R 469
	40 B L R 780
	I L R 1938-2 C 214
	173 I C 763
121	1938 O W N 326
	1938 A L J 283
	1938 O L R 166
	173 I C 736
	1938 All L R 232
	1938 A W R 99
	47 M L W 601
	4 B R 440
	1938 M W N 493
	1938 P W N 441
	42 C W N 989
	32 S L R 462
	40 B L R 1053
	1938 Pesh L J 27
123	1938 A L J 292
	173 I C 772

AIR	Other Journals
123	1938 O L R 169
	1938 All L R 239
	1938 M W N 471
	47 M L W 618
	1938-1 M L J 597
	42 C W N 565
	1938 O W N 390
	1938 A W R 102
	4 B R 415
	67 C L J 241
	32 S L R 448
	40 B L R 767
	I L R 1938 M 646
130	174 I C 1
	42 C W N 621
	1938 O L R 189
	1938 A L J 382
	1938 O W N 416
	4 B R 490
	19 P L T 343
	1938 M W N 505
	1938 All L R 309
	1938-1 M L J 647
	39 Cr L J 452
	1938 A W R 116
	65 I A 158
	32 S L R 476
	40 B L R 787
	1938 M Cr C 220
	1938 P W N 320
	67 C L J 161
	I L R 1938-2 C 295
136	174 I C 47
	47 M L W 596
	1938 M W N 637
139	1938 O W N 504
	1938 O L R 200
	4 B R 508
	42 C W N 687
	1938 All L R 338
	1938 P W N 417
	174 I C 288
	32 S L R 492
	40 B L R 1057
143	175 I C 178
152	42 C W N 677
	4 B R 549
	1938-1 M L J 834
	1938 O L R 235
	174 I C 564
	1938 M W N 487
	67 C L J 299
	1938 All L R 367
	65 I A 263
	32 S L R 502
	40 B L R 799
	I L R 1938-2 C 381
159	1938 O L R 223
	4 B R 540
	42 C W N 733
	174 I C 545
	1938 All L R 359
	67 C L J 338
	32 S L R 517
	1938 O W N 859
	I L R 1938 B 421
	40 B L R 1109
165	1938 A W R 123
	1938 M W N 481
	4 B R 524
	47 M L W 753
	42 C W N 705

AIR	Other Journals
165	1938 A L J 488
	1938 O L R 218
	1938 O W N 521
	174 I C 551
	1938 All L R 352
	1938-2 M L J 11
	67 C L J 254
	1938 P W N 535
	65 I A 182
	I L R 1938 A 601
	32 S L R 531
	40 B L R 811
	19 P L T 689
169	174 I C 977
	1938 A W R 138
	1938 O L R 282
	4 B R 606
	1938 M W N 545
	48 M L W 16
	42 C W N 901
	1938 P W N 514
	1938 All L R 415
	65 I A 219
	1938 O W N 581
	67 C L J 350
	1938-2 M L J 210
	40 B L R 843
	13 Luck 494
	1938 A L J 843
	32 S L R 772
175	175 I C 1
	1938 O L R 291
	42 C W N 873
	1938 I T R 414
	4 B R 645
	48 M L W 47
	1938 P W N 568
	1938 A W R 163
	1938 All L R 436
	1938 O W N 621
	1938-2 M L J 115
	65 I A 236
	67 C L J 442
	32 S L R 549
	1938 A L J 754
	I L R 1938 B 487
	40 B L R 854
	1938 M W N 888
181	174 I C 868
	1938 A L J 549
	1938 O L R 288
	1938 A W R 136
	42 C W N 817
	1938 M W N 669
	4 B R 653
	1938 O W N 652
	65 I A 213
	1938 All L R 454
	48 M L W 123
	I L R 1938 L 313
	40 B L R 1065
	1938 P W N 712
	40 P L R 988
	19 P L T 756
	1938-2 M L J 962
	32 S L R 760
183	174 I C 867
	1938 A L J 547
	1938 A W R 129
	1938 O L R 317
	1938 M W N 666
	4 B R 665

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183	1938 All L R 472
	1938 O W N 619
	40 P L R 779
	32 S L R 545
	40 B L R 1063
184	1938 A W R 131
	1938 O L R 278
	174 I C 870
	4 B R 593
	42 C W N 845
	1938-2 M L J 1
	67 C L J 266
	1938 P W N 470
	48 M L W 1
	40 P L R 740
	65 I A 198
	1938 All L R 430
	1938 M W N 757
	1938 O W N 698
	ILR 1938 L 383
	40 B L R 835
	1938 A L J 825
	32 S L R 749
189	1938 O L R 301
	175 I C 332
	4 B R 638
	48 M L W 66
	42 C W N 1021
	1938 P W N 555
	1938 M W N 766
	1938-2 M L J 234
	19 P L T 591
	1938 All L R 519
	1938 O W N 727
	1938 A L J 763
	1938 A W R 184
	40 B L R 1068
	1938 Pesh L J 47
	32 S L R 798
191	1938 O L R 304
	175 I C 327
	42 C W N 957
	48 M L W 8
	4 B R 677
	65 I A 286
	1938 All L R 492
	1938 M W N 753
	67 C L J 456
	1938-2 M L J 169
	1938 A L J 807
	40 B L R 868
	19 P L T 625
	ILR 1938 B 502
	1938 A W R 197
	1938 O W N 1009
	32 S L R 786
195	175 I C 459
	1938 O L R 309
	4 B R 673
	1938 A W R 145
	48 M L W 62
	1938 P W N 578
	65 I A 252
	42 C W N 1013
	1938 O W N 693
	1938-2 M L J 228
	67 C L J 540
	1938 All L R 502
	1938 A L J 799
	40 B L R 907
	40 P L R 829
	1938 M W N 885

AIR	Other Journals
195	ILR 1938 L 453
	32 S L R 821
	19 P L T 712
198	175 I C 449
	1938 O L R 312
	4 B R 719
	48 M L W 40
	1938 M W N 769
	1938 All L R 525
	1938 O W N 731
	1938 R L R 417
	1938-2 M L J 469
	40 B L R 1075
	19 P L T 749
	32 S L R 810
202	1938 O L R 319
	175 I C 454
	48 M L W 57
	1938 M W N 751
	42 C W N 1018
	1938 O W N 688
	4 B R 730
	1938 P W N 627
	1938-2 M L J 239
	1938 A L J 803
	1938 All L R 566
	19 P L T 641
	40 P L R 837
	40 B L R 1071
	1938 A W R 202
	32 S L R 803
205	175 I C 657
	1938 M W N 774
	48 M L W 127
210	1938 O L R 321
	1938 A W R 151
	175 I C 775
	4 B R 713
	1938 O W N 606
	1938 R D 606
	1938 A L J 786
	1938 All L R 558
	1938-2 M L J 596
	13 Luck 508
	68 C L J 193
	65 I A 314
	19 U D 96
	32 S L R 845
216	1938 A W R 148
	175 I C 772
	48 M L W 70
	1938 O W N 655
	1938 M W N 748
	1938 O L R 330
	1938 A L J 795
	40 B L R 912
	1938-2 M L J 332
	68 C L J 44
	4 B R 789
	1938 All L R 659
	32 S L R 828
219	175 I C 769
	1938 M W N 762
	1938 A W R 158
	1938 O L R 332
	1938 O W N 715
	1938 R D 662
	68 C L J 36
	1938-2 M L J 323
	1938 All L R 645
	ILR 1938 L 514
	4 B R 745

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219	40 P L R 1040
	65 I A 301
	32 S L R 835
223	175 I C 457
	1938 O L R 328
	1938 M W N 768
	4 B R 753
	1938 All L R 641
225	176 I C 5
228	48 M L W 191
	1938 O W N 634
	176 I C 1
	1938 O L R 336
	1938 M W N 834
	42 C W N 1082
	1938 A W R 182
	4 B R 792
	1938-2 M L J 562
	1938 All L R 664
	32 S L R 886
230	42 C W N 1041
	48 M L W 199
	19 P L T 561
	176 I C 2
	1938 M W N 814
	1938 P W N 612
	1938 O L R 344
	1938 O W N 883
	1938 A W R 186
	1938 All L R 672
	68 C L J 145
	4 B R 815
	1939-1 M L J 147
	32 S L R 879
232	48 M L W 204
	176 I C 15
	1938 I T R 521
	4 B R 766
	42 C W N 1070
	67 C L J 554
	1938 O L R 337
	1938 P W N 667
	40 B L R 916
	1938 M W N 848
	1938 O W N 846
	1938 A W R 190
	1938 All L R 651
	ILR 1938 B 752
	65 I A 332
	32 S L R 862
238	176 I C 979
243	42 C W N 1098
	1938 O L R 347
	176 I C 433
	68 C L J 50
	1938-2 M L J 410
	1938 O W N 906
	1938 All L R 683
	48 M L W 533
	4 B R 811
	1938 I T R 632
	1938 M W N 1264
	65 I A 351
	ILR 1938-2 C 624
	32 S L R 890
245	48 M L W 371
	1938 A W R 175
	176 I C 883
	1938 O W N 796
	1938 M W N 928
	1938 O L R 391
	4 B R 854

AIR	Other Journals
215	43 C W N 1
	1938 All L R 744
	68 C L J 458
	32 S L R 907
248	176 I C 881
	1938 O L R 384
	42 C W N 1215
	19 P L T 705
	1938 P W N 715
	4 B R 832
	68 C L J 275
	1938 All L R 736
	1938-2 M L J 734
	65 I A 380
	ILR 1938-2 C 665
	32 S L R 931
250	1938 O W N 816
	48 M L W 368
	176 I C 890
	1938 A W R 178
	1938 M W N 934
	19 P L T 709
	1938 O L R 388
	1938 All L R 750
	5 B R 24
	32 S L R 913
252	1938 O W N 788
	176 I C 769
	1938 O L R 361
	1938 A W R 180
	4 B R 827
	1938 All L R 715
	1938-2 M L J 912
	13 Luck 646
	68 C L J 390
	65 I A 397
	32 S L R 949
254	1938 O W N 819
	48 M L W 423
	42 C W N 1237
	1938 M W N 955
	1938 O L R 412
	1938 P W N 744
	177 I C 1
	68 C L J 282
	1938 All L R 759
	1938-2 M L J 852
	5 B R 27
	40 B L R 1241
	65 I A 355
	ILR 1938-2 C 653
	32 S L R 918
259	42 C W N 1125
	176 I C 906
	1938 O L R 395
	48 M L W 466
	1938 M W N 1002
	5 B R 1
	1938 All L R 731
	40 B L R 1236
	1939 R L R 59
	32 S L R 898
	1939-M L J 192
263	176 I C 886
	1938 O L R 378
	4 B R 819
	1933 All L R 720
	43 C W N 29
	1938-2 M L J 992
	32 S L R 954
266	1938 O W N 809

AIR	Other Journals
266	176 I C 893
	1938 A W R 170
	1938 P W N 698
	1938 O L R 405
	42 C W N 1252
	40 P L R 876
	48 M L W 537
	1933 M W N 969
	19 P L T 717
	4 B R 850
	1933-2 M L J 780
	1938 M Cr C 305
	1938 All L R 753
	40 B L R 1254
	68 C L J 328
	65 I A 388
	ILR 1938 L 628
	32 S L R 937
270	48 M L W 353
	176 I C 657
276	1938 O W N 869
	1938 O L R 364

AIR	Other Journals
276	176 I C 773
	4 B R 840
	1933 All L R 726
	1938-2 M L J 902
	1933 Pesh L J 80
	1938 M W N 1271
	1938 P W N 880
	32 S L R 917
277	178 I C 406
	1938 O W N 1147
	1938 O L R 496
	1938 All L R 896
	5 B R 161
	49 M L W 126
	1939 M W N 92
	1938 A W R 230
281	43 C W N 113
	178 I C 472
	19 P L T 861
	5 B R 165
	1938 O L R 505
	1938 P W N 908

AIR	Other Journals
281	1933 All L R 905
	1939-1 M L J 1
	68 C L J 505
284	178 I C 659
	1938 A W R 222
	1938 O L R 521
	43 C W N 205
	5 B R 178
	1938 All L R 922
	68 C L J 567
	1939-1 M L J 93
	1939 M W N 78
290	1933 O L R 510
	1938 O W N 1218
	178 I C 476
	1938 A W R 209
	1938 All L R 910
	5 B R 163
	1939 P W N 1
	1939 M W N 24
	20 P L T 81
292	178 I C 425

AIR	Other Journals
292	43 C W N 87
	1938 O L R 501
	1933 A W R 212
	1938 All L R 900
	5 B R 154
	68 C L J 497
	1939 M W N 1
	1939-1 M L J 56
	20 P L T 61
295	178 I C 490
	19 P L T 867
	1938 O L R 514
	1938 P W N 895
	1938 O W N 1256
	1933 A W R 216
	1938 All L R 914
	5 B R 171
	1939 M W N 18
	68 C L J 483
	49 M L W 10
	43 C W N 197
	17 Pat 770

Other Journals = A. I. R. 1938 Privy Council

L R 65 I. A.

LRIA	AIR		
1	1938	PC	1
12	"	"	8
21	"	"	12
32	"	"	15
45	"	"	20
57	"	"	49
66	"	"	67
75	"	"	52
93	"	"	34
106	"	"	73
119	"	"	80
132	"	"	66
137	"	"	113
150	"	"	118
158	"	"	130
182	"	"	165
198	"	"	184
213	"	"	181
219	"	"	169
236	"	"	175
252	"	"	195
263	"	"	152
286	"	"	191
301	"	"	219
314	"	"	210
332	"	"	232
354	"	"	243
365	"	"	254
380	"	"	248
388	"	"	266
397	"	"	252

I L R 1938 All

ILR	AIR		
314	1938	PC	80
326	"	"	66
601	"	"	165

1938 A L J

ALJ	AIR		
41	1938	PC	8
46	"	"	1
72	1938	PC	20
77	"	"	4
81	"	"	12
87	"	"	15
138	"	"	84
141	"	"	80
148	"	"	66
169	"	"	52
174	"	"	34
176	"	"	73
179	"	"	91
190	"	"	77
194	"	"	73
200	"	"	98
215	"	"	84
261	"	"	118
264	"	"	110
273	"	"	52
288	"	"	121
292	"	"	123
301	"	"	113
382	"	"	130
488	"	"	165
547	"	"	183
549	"	"	181
754	"	"	175
763	"	"	189
786	"	"	210
795	"	"	216
799	"	"	195
803	"	"	202
807	"	"	191
825	"	"	184
843	"	"	169
1223	1939	"	8

1938 All L R

AllLR	AIR		
1	1938	PC	8
4	"	"	4
25	"	"	20
29	"	"	12
50	1937	PC	240
66	1938	"	59
71	"	"	61
77	"	"	84
84	"	"	49
90	"	"	38
100	"	"	52
110	"	"	15
115	"	"	87
121	"	"	65
126	"	"	71
133b	"	"	66
134	"	"	84
138	"	"	73
144	"	"	77
148	"	"	80
167	"	"	67
175	"	"	93
209	"	"	113
220	"	"	110
232	"	"	121
239	"	"	123
247	"	"	118
309	"	"	130
338	"	"	139
352	"	"	165
359	"	"	159
367	"	"	152
415	"	"	169
430	"	"	184
436	"	"	175
454	"	"	181
472	"	"	183
492	"	"	191
502	"	"	195
512	"	"	40
519	"	"	189
525	"	"	198
558	"	"	210
566	"	"	202
611	"	"	223
645	"	"	219

1938 All L R

AllLR	AIR		
651	1938	PC	232
659	"	"	216
664	"	"	228
672	"	"	230
683	"	"	243
715	"	"	252
720	"	"	263
726	"	"	276
731	"	"	259
736	"	"	248
744	"	"	245
750	"	"	250
753	"	"	266
759	"	"	254
891	1939	"	8
896	1938	"	277
900	"	"	292
905	"	"	281
910	"	"	290
914	"	"	295
922	"	"	284

1938 A W R (PC)

AWR	AIR		
1	1938	PC	7
2	"	"	1
7	"	"	4
10	"	"	8
14	"	"	12
19	"	"	20
23	"	"	15
28	"	"	33
30	"	"	66
32	"	"	80
37	"	"	71
39	"	"	65
40	"	"	59
43	"	"	84
52	"	"	67
56	"	"	77
59	"	"	110

1938 A W R (PC)

AWR	AIR		
62	1938	PC	34
67	"	"	98
74	"	"	73
79	"	"	91
87	"	"	118
90	"	"	52
99	"	"	121
102	"	"	123
109	"	"	113
116	"	"	130
123	"	"	165
129	"	"	183
131	"	"	184
136	"	"	181
138	"	"	169
145	"	"	195
148	"	"	216
151	"	"	210
158	"	"	219
163	"	"	175
170	"	"	266
175	"	"	245
178	"	"	250
180	"	"	252
182	"	"	228
184	"	"	189
186	"	"	230
190	"	"	232
197	"	"	191
202	"	"	202
206	1939	"	8
209	1938	"	290
212	"	"	292
216	"	"	295
222	"	"	284
230	"	"	277

19 U D

UD	AIR		
96	1938	PC	210

ILR 1938 Bom

ILR	AIR		
239	1938	PC	1
249	"	"	15
421	"	"	159
487	"	"	175
502	"	"	191
752	"	"	222

40 Bom L R

BLR	AIR		
1	1937	PC	296
6	"	"	306
257	1938	"	1
269	"	"	15
277	"	"	7
280	"	"	8
285	"	"	12
292	"	"	20
697	"	"	38
700	"	"	49
704	"	"	34
713	"	"	52
724	"	"	73
731	"	"	84
735	"	"	80
742	"	"	77
746	"	"	67
752	"	"	66
755	"	"	71
758	"	"	65
760	"	"	98
767	"	"	123
780	"	"	118
787	"	"	130
799	"	"	152
811	"	"	165
835	"	"	184
843	"	"	169
854	"	"	175
868	"	"	191
907	"	"	195
912	"	"	216
916	"	"	232
1053	"	"	121
1057	"	"	139
1063	"	"	183
1065	"	"	181
1068	"	"	189
1071	"	"	202
1075	"	"	198
1109	"	"	159
1236	"	"	259
1241	"	"	254
1254	"	"	266

ILR (1938) 1 Cal

ILR	AIR		
1	1937	PC	251
66	"	"	256
440	"	"	306

ILR (1938) 2 Cal

ILR	AIR		
72	1938	PC	67
214	"	"	118
295	"	"	130
381	"	"	152
621	"	"	243
653	"	"	254
665	"	"	248

67 C L J

CLJ	AIR		
62	1938	PC	113
101	"	"	118
118	"	"	84
153	"	"	67
161	"	"	130
176	"	"	66
179	"	"	61
241	"	"	123
254	"	"	165
266	"	"	184
299	"	"	152
338	"	"	159
350	"	"	169
442	"	"	175
456	"	"	191
540	"	"	195
554	"	"	232

68 C L J

CLJ	AIR		
36	1938	PC	219
44	"	"	216
50	"	"	243
145	"	"	230
193	"	"	210
275	"	"	248
282	"	"	254
328	"	"	266
339	1939	"	6
390	1938	"	252
458	"	"	245
488	"	"	295
497	"	"	292
505	"	"	281
567	"	"	284
581	1939	"	1

ILR 1938 Lah

ILR	AIR		
1	1937	PC	292
63	1938	"	73
129	"	"	8
313	"	"	181
383	"	"	184
453	"	"	195
514	"	"	219
623	"	"	266

40 Pun L R

PLR	AIR		
179	1938	PC	65
180	"	"	77
247	"	"	73
253	"	"	71
740	"	"	184
779	"	"	183
829	"	"	195
837	"	"	202
843	"	"	12
876	"	"	266
988	"	"	181
1021	1937	"	292
1040	1939	"	219

39 Cr L J

CrLJ	AIR		
452	1938	PC	130

173 I C

IC	AIR		
1	1938	PC	80
15	"	"	67
19	"	"	91
412	"	"	93
612	"	"	110
625	"	"	113
736	"	"	121
763	"	"	118
772	"	"	123

174 I C

IC	AIR		
1	1938	PC	130
47	"	"	136
288	"	"	139
545	"	"	159
551	"	"	165
564	"	"	152
867	"	"	183
868	"	"	181
870	"	"	184
977	"	"	169

175 I C

IC	AIR		
1	1938	PC	175
178	"	"	143
327	"	"	191
332	"	"	189
449	"	"	198
454	"	"	202
457	"	"	223
459	"	"	195
657	"	"	205
769	"	"	219
772	"	"	216
775	"	"	210

176 I C

IC	AIR		
1	1938	PC	228
2	"	"	230
5	"	"	225
15	"	"	232
433	"	"	243
657	"	"	270
769	"	"	252
773	"	"	276
881	"	"	248
883	"	"	245
886	"	"	263
890	"	"	250
898	"	"	266
906	"	"	259
979	"	"	238

177 I C

IC	AIR		
1	1938	PC	254
754	"	"	23

178 I C

IC	AIR		
386	1939	PC	8
406	1938	"	277
425	"	"	292
472	"	"	281
476	"	"	290
490	"	"	295
659	1938	PC	284
906	1939	"	1

ILR 1938 Mad

ILR	AIR		
1	1937	PC	261
91	"	"	296
360	1938	"	52
551	"	"	34
616	"	"	123

(1938) 1 M L J

MLJ	AIR		
1	1938	PC	1
41	"	"	7
83	"	"	12
123	"	"	8
161	"	"	15
209	"	"	20
268	"	"	52
302	"	"	61
359	"	"	73
426	"	"	34
458	"	"	80
502	1937	"	261
545	"	"	296
590	1938	"	49
597	"	"	123
640	"	"	67
647	"	"	130
704	"	"	118
743	1937	"	256
731	1938	"	113
785	"	"	66
788	1937	"	299
834	1938	"	152
849	"	"	84

(1938) 2 M L J

MLJ	AIR		
1	1938	PC	184
11	"	"	165
115	"	"	175
169	"	"	191
210	"	"	169
228	"	"	195
234	"	"	189
239	"	"	202
323	"	"	219
332	"	"	216
410	"	"	243
469	"	"	198
562	"	"	228
596	"	"	210
734	"	"	248
780	"	"	266
852	"	"	254
902	"	"	276
906	1939	"	6
912	1938	"	252
962	"	"	181
994	"	"	253

47 M L W

MLW	AIR		
1	1938	PC	7
3	"	"	20
9	"	"	1
16	"	"	8
73	"	"	23
78	1938	PC	12
110	"	"	34
124	"	"	59
205	"	"	15
214	"	"	38
221	"	"	71
225	"	"	65
227	"	"	80
234	"	"	66
239	"	"	73
281	"	"	67
329	"	"	52
409	"	"	91
596	"	"	136
601	"	"	121
614	"	"	118
618	"	"	123
619	"	"	110
753	"	"	165
796	"	"	84
799	1937	"	299

48 M L W

MLW	AIR		
1	1938	PC	184
8	"	"	191
16	"	"	169
40	"	"	198
47	"	"	175
57	"	"	202
62	"	"	195
66	"	"	189
70	"	"	216
123	"	"	181
127	"	"	205
191	"	"	228
199	"	"	230
204	"	"	232
353	"	"	270
368	"	"	250
371	"	"	245
423	"	"	254
466	"	"	259
533	"	"	243
537	"	"	266
912	1939	"	6

1938 M W N

MWN	AIR		
1	1938	PC	7
41	"	"	8
83	"	"	4
131	"	"	15
145	"	"	20
152	"	"	1
156	1937	"	314
390	1938	"	110
401	"	"	118
471	"	"	123
481	"	"	165
487	"	"	152
493	"	"	121
503	"	"	38
505	"	"	130
527	"	"	65
545	"	"	169
552	"	"	52
573	"	"	66
614	"	"	59

1938 M W N

MWN	AIR		
618	1938	PC	71
621	"	"	73
626	"	"	80
637	"	"	136
646	"	"	67
666	"	"	183
669	"	"	181
748	"	"	216
751	"	"	202
753	"	"	191
757	"	"	184
762	"	"	219
766	"	"	189
768	"	"	223
769	"	"	198
774	"	"	205
781	"	"	12
814	"	"	230
834	"	"	228
848	"	"	232
885	"	"	195
888	"	"	175
928	"	"	245
934	"	"	250
955	"	"	254
969	"	"	266
1002	"	"	269
1264	"	"	243
1266	"	"	34
1271	"	"	276

1938 M Cr C

MCrC	AIR		
220	1938	PC	130
305	"	"	266

10 I T C

ITC	AIR		
163	1937	PC	36

1938 I T R

ITR	AIR		
36	1938	PC	1
61	"	"	8
206	"	"	118
414	"	"	175
521	"	"	232
632	"	"	243

ILR 13 Luck

ILR	AIR		
61	1938	PC	7
494	"	"	169
508	"	"	210
646	"	"	252

1938 O L R

OLR	AIR		
1	1938	PC	4
3	"	"	8
25	"	"	20
29	"	"	12
33	1937	"	240
42	1938	"	59
53	"	"	61
57	"	"	49
61	"	"	34
66	"	"	88
68b	"	"	52
76	"	"	15
83	1938	PC	87
87	"	"	65
90	"	"	66
92	"	"	71
95	"	"	84
104	"	"	73
110	"	"	77
112	"	"	80
119	"	"	67
127	"	"	98
137	"	"	113
159	"	"	110
166	"	"	121
169	"	"	123
175	"	"	118
189	"	"	130
200	"	"	139
218	"	"	165
223	"	"	159
235	"	"	152
278	"	"	184
282	"	"	169
288	"	"	181
291	"	"	175
301	"	"	189
304	"	"	191
309	"	"	195
312	"	"	198
317	"	"	183
319	"	"	202
321	"	"	210
328	"	"	223
330	"	"	216
332	"	"	219
336	"	"	228
337	"	"	232
344	"	"	230
347	"	"	243
361	"	"	252
364	"	"	276
378	"	"	263
384	"	"	248
388	"	"	250
391	"	"	245
395	"	"	259
405	"	"	266
412	"	"	254
490	1939	"	8
496	1938	"	277
501	"	"	292
505	"	"	281
510	"	"	290
514	"	"	295
521	"	"	284

1938 O W N

OWN	AIR		
1	1938	PC	8
10	"	"	4
15	"	"	12
48	"	"	59
52	"	"	61
90	"	"	87
97	"	"	88
117	"	"	84
138	"	"	98
158	"	"	20
167	"	"	84
188	"	"	15
196	"	"	77
201	1938	PC	65
203	"	"	66
206	"	"	52
233	"	"	80
245	"	"	73
253	"	"	71
261	"	"	67
268	"	"	113
299	"	"	110
326	"	"	121
385	"	"	118
390	"	"	123
416	"	"	130
504	"	"	139
521	"	"	165
581	"	"	169
606	"	"	210
619	"	"	183
621	"	"	175
634	"	"	228
652	"	"	181
655	"	"	216
688	"	"	202
693	"	"	195
698	"	"	184
715	"	"	219
727	"	"	189
731	"	"	198
788	"	"	252
796	"	"	245
809	"	"	266
816	"	"	250
819	"	"	254
846	"	"	232
859	"	"	159
869	"	"	276
883	"	"	230
906	"	"	243
1009	"	"	191
1147	"	"	277
1216	1939	"	8
1248	1938	"	290
1256	"	"	295

1938 R D

RD	AIR		
214	1938	PC	20
399	"	"	77
606	"	"	210
662	"	"	219

ILR 17 Pat

ILR	AIR		
1	1938	PC	49
58	"	"	12
69	"	"	20
110	"	"	61
770	"	"	295

4 B R

BR	AIR		
1	1937	PC	299
169	1938	"	7
171	"	"	1
175	"	"	8
190	"	"	4
198b	"	"	20
207	"	"	12
234	"	"	61
238	"	"	59
243	1938	PC	240
248	1938	"	49
251	"	"	34
260	"	"	52
272	"	"	38
287	"	"	15
295	"	"	87
302	"	"	65
305	"	"	66
312b	"	"	71
317	"	"	73
322	"	"	84
353	"	"	77
358	"	"	80
365	"	"	98
374	"	"	67
394	"	"	113
408	"	"	110
415	"	"	123
440	"	"	121
472	"	"	118
490	"	"	130
508	"	"	139
524	"	"	165
540	"	"	159
549	"	"	152
593	"	"	184
606	"	"	169
645	"	"	175
658	"	"	181
665	"	"	188
673	"	"	195
677	"	"	191
685	"	"	189
713	"	"	210
719	"	"	198
730	"	"	202
745	"	"	219
753	"	"	223
756	"	"	232
789	"	"	216
792	"	"	228
811	"	"	243
815	"	"	230
819	"	"	263
827	"	"	252
832	"	"	248
840b	"	"	276
850	"	"	266
854	"	"	245

19 P L T

PLT	AIR		
1	1938	PC	7
29	"	"	12
69	"	"	49
74	"	"	61
125	"	"	67
131	"	"	65
147	"	"	52
169	"	"	34
215	"	"	80
222	"	"	66
285	"	"	8
290	"	"	118
343	"	"	130
561	"	"	230
591	"	"	189
625	"	"	191
641	"	"	202
689	1938	PC	165
705	"	"	248
709	"	"	250
712	"	"	195
717	"	"	266
749	"	"	198
756	"	"	181
861	"	"	281
867	"	"	295

1938 P W N

PWN	AIR		
1	1938	PC	20
63	"	"	12
107	"	"	61
129	"	"	49
152	"	"	52
166	"	"	88
170	"	"	80
209	"	"	65
234	"	"	8
262	"	"	118
274	"	"	91
320	"	"	130
360	"	"	67
417	"	"	139
436	"	"	110
441	"	"	121
466	"	"	66
470	"	"	184
514	"	"	169
535	"	"	165
548	"	"	73
555	"	"	189
568	"	"	175
578	"	"	195
612	"	"	230
627	"	"	202
646	"	"	1
667	"	"	232
698	"	"	266
712	"	"	181
715	"	"	248
744	"	"	254
880	"	"	276
882	1939	"	6
895	1938	"	295
908	"	"	281

1938 Pesh L J

Pesh LJ	AIR		
1	1938	PC	8
27	"	"	121
47	"	"	189
80b	"	"	276

1938 R L R

RLR	AIR		
417	1938	PC	198

32 S L R

SLR	AIR		
221	1938	PC	7
225	"	"	1
235	"	"	4
242	"	"	8
251	"	"	12
264	"	"	15
276	"	"	20
285	"	"	88

32 S L R				32 S L R				32 S L R				32 S L R				32 S L R			
SLR	A I R			SLR	A I R			SLR	A I R			SLR	A I R			SLR	A I R		
290	1938	PC	49	392	1938	PC	65	517	1938	PC	159	803	1938	PC	202	898	1938	PC	259
298	"	"	61	395	"	"	77	531	"	"	165	810	"	"	198	907	"	"	245
380	"	"	59	401	"	"	98	545	"	"	183	821	"	"	195	913	"	"	250
313	"	"	52	426	"	"	110	549	"	"	175	828	"	"	216	918	"	"	254
328	"	"	34	433	"	"	113	716	1933	"	124	835	"	"	219	931	"	"	248
340	"	"	87	448	"	"	123	749	1938	"	184	845	"	"	210	937	"	"	266
350	"	"	73	462	"	"	121	760	"	"	181	862	"	"	232	947	"	"	276
362	"	"	80	469	"	"	118	772	"	"	169	879	"	"	230	949	"	"	252
374	"	"	67	476	"	"	130	786	"	"	191	886	"	"	228	954	"	"	263
383	"	"	71	492	"	"	139	798	"	"	189	890	"	"	243	963	1939	"	6
388	"	"	66	502	"	"	152												

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THE
ALL INDIA REPORTER
1938
PRIVY COUNCIL

*** * A. I. R. 1938 Privy Council 1**

(From Bombay)

5th November 1937

LORD THANKERTON, LORD WRIGHT AND SIR GEORGE RANKIN.

Commissioner of Income-tax, Bombay— Appellant.

v.

Sarangpur Cotton Manufacturing Co. Ltd., Ahmedabad — Respondents.

Privy Council Appeal No. 77 of 1936.

*** * Income-tax Act (1922), S. 13—Income-tax Officer is not prima facie entitled to accept profits shown by method of accounting regularly employed by assessee—He must exercise his judgment under Proviso properly—He is not right in computing profits in accordance with that method when it in fact does not show true profits.**

Section 13 relates to a method of accounting regularly employed by the assessee for his own purposes and does not relate to a method of making up the statutory return for assessment to income-tax. The Income-tax Officer is not prima facie entitled to accept under S. 13 the profits shown by the accounts, where there is a method of accounting regularly employed by the assessee. It is the duty of the Income-tax Officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on this question. He is not right in computing for the purpose of S. 10 income, profits and gains in accordance with the method of accounting regularly employed by the assessee when that method in fact does not show the true income, profits and gains. [P 3 C 1; P 4 C 1, 2]

J. Millard Tucker and Hubert Hull — *for Appellant.*

R. P. Hills — *for Respondent.*

Lord Thankerton.—This is an appeal from a judgment of the High Court of Judicature at Bombay, dated 28th March 1935 upon a question of law referred to the High Court by the present appellant under S. 66, Indian Income-tax Act, 1922. The question arises out of the assessment of the respondents to income-tax for the financial year ending 31st March 1932 and concerns the computation of the profits or gains of their business for the year of account ending on 31st December 1930 under S. 10 of the Act. The respondents are a limited liability company doing business at Ahmedabad as manufacturers of cloth and yarn. For the purpose of their assessment for the year ending 31st March 1932 they made a return under S. 22 (1) of the Act on 18th July 1931 to the Income-tax Officer, which consisted of (a) a copy of the audited balance sheet and profit and loss account of the Company for the accounting year ending on 31st December 1930 which showed the profit for the year as Rs. 2,64,086, (b) a return of the total income of the Company for assessment, which included the income, profits and gains as per profit and loss account for the accounting year as Rupees 1,99,086 and (c) a covering letter which explained the adjustment of the figure in the profit and loss account so as to arrive at the figure of income in the return, and which was in the following terms :

We herewith beg to enclose the Income-tax Form No. 4449 for the year 1931-32 duly filled in showing therein the profits as per statement shown below, which please receive and pass the receipts for the same.

Rs.	
2,64,086	*Profit*—as per Balance Sheet for the year ending 31st December 1930.
3,43,353	*Add*—Difference for the undervaluation in stock at the end of 1930 (at market rate).
6,07,439	
3,97,634	*Less*—Difference for the undervaluation in stock at the end of 1929.
2,09,805	
10,719	*Less*—Premium received by sale of Government Bond of 1932.
1,99,086	

The printed copy of the Balance Sheet for the year 1930 is enclosed herewith which please note.

On receipt of the above return the Income-tax Officer issued a notice under S. 23 (2) of the Act on the assessees to produce evidence in support thereof, and, in compliance, the assessees duly produced their closed accounts for the accounting year. The assessees contended, before the Income-tax Officer, (1) that the undervaluation of the closing stock of the assessee Company for the year 1929 disallowed by Rs. 3,97,634 in the assessment year 1930-31, should be allowed as an addition in the opening stock of the current 1930, and that the undervaluation of the closing stock of the Company by Rs. 3,59,966, should also be added in the closing stock of the Company in the current assessment; (2) that the method of adopting the undervaluations of the opening as well as closing stocks was adopted by this office in previous assessments and that it should not be departed from in the current year's assessment ; (3) that the ruling in 57 I A 21[1] is also in consonance with the method adopted by this office in considering the undervaluations of both the opening and closing stocks in computing the income of the Company for income-tax purposes. In his assessment order of 26th February 1932 the Income-tax Officer states :

As regards above contentions, according to the Privy Council's decision in 57 I A 21,[1] I understand that, if the undervaluation of the closing stock of any assessee is considered in the assessment in any year, the undervaluation of the opening stock should also be considered in his assessment of that year; but if the undervaluation of the closing stock is not considered in the assessment, the undervaluation of the opening stock should also be left out of the same assessment. I accordingly set aside the question of the undervaluations of the opening as well as closing stocks of the assessee Company in the current year's assessment, and accept the profit of Rs. 2,64,086, shown in the statement of the profit and loss account of the Company. Under the circumstances, the claim of the assessee Company for Rs. 37,668, as a deduction from the current year's assessment is rejected.

On an appeal by the assessees, the Assistant Commissioner of Income-tax confirmed the assessment by his order dated 22nd November 1932. The assessees then applied to the present appellant to review the above orders under S. 33 of the Act, or, alternatively, to make a reference of questions of law to the High Court under S. 66 (2) of the Act. The appellant declined to review the orders, and, on the ground that no legal point was involved, he also declined to make the reference. Thereafter the High Court, on an application by the assessees, under S. 66 (3) of the Act, required the appellant to make a reference, and he made the present reference with the question of law as formulated by the High Court, viz.:

Whether in view of the provisions of S. 13, Income-tax Act or otherwise, the Income-tax Officer was right in computing for the purpose of S. 10 of that Act income, profits and gains in accordance with the method of accounting regularly employed by the assessee, whether or not that method in fact shows the true income, profits and gains.

The appellant suggested the substitution of another question, but his suggestion was not adopted by the High Court. The Court however without referring the case back, amended the question referred as follows :

Whether in the circumstances of the case the Income-tax Officer was entitled to compute the income, profits and gains of the assessees upon the basis of the printed copy of the profit and loss account sent with the letter of the assessees of 18th July 1931, without regard to any undervaluation of the stock which may have been or may be proved to have been made.

By their order, dated 28th March 1935, the High Court amended the question accordingly and answered the amended question in the negative. Their opinion was that the covering letter of 18th July 1931 formed part of the method of accounting employed by the assessees within the meaning of S. 13 of the Act, and that the Income-tax Officer was not entitled to split up the method of accounting and to regard the profit and loss account apart from the covering letter ; that the Income-tax Officer had only accepted a portion of the method, without taking the method as a whole, which he was not entitled to do. They therefore held that the matter was still at large for the proper decision of the Income-tax Officer. Their Lordships find themselves unable to agree with the view of the High Court as to the meaning of S. 13 of the Act, which provides as follows :

13. Income, profits and gains shall be computed for the purposes of Ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee :

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

1. Commr. of Income-tax, Bombay v. Ahmedabad New Cotton Mills Co. Ltd., (1930) 17 A I R P C 56=121 I C 543=57 I A 21=54 Bom 213 (P C).

Their Lordships are clearly of opinion that the section relates to a method of accounting regularly employed by the assessee for his own purposes—in this case for the purposes of the Company's business — and does not relate to a method of making up the statutory return for assessment to income-tax. Secondly, the section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom. It may well be that, though the profit brought out in the accounts is not the true figure for income-tax purposes, the true figure can be accurately deduced therefrom. The simplest case would be where it appears on the face of the accounts that a stated deduction has been made for the purpose of a reserve. But there may well be more complicated cases in which, nevertheless, it is possible to deduce the true profit from the accounts, and the judgment of the Income-tax Officer under the proviso must be properly exercised. It is misleading to describe this duty of the Income-tax Officer as a discretionary power.

Despite some statements in the reference, which will be referred to later, their Lordships agree with the High Court that the facts stated make clear that here the Income-tax Officer has never exercised his judgment under the Proviso, and their Lordships are further of opinion that, if he had so exercised his judgment, the Income-tax Officer would not reasonably have come to any other opinion than that the profit shown in the profit and loss account could not be the true figure for income-tax purposes. It is necessary now to consider some of the statements to be found in the reference, in addition to the passage already cited from the assessment order of the Income-tax Officer. In the order of the Assistant Commissioner on the appeal the following passages occur :

It is only for the past five years that the opening and closing stocks have been revalued because they were found to be grossly undervalued, but the Income-tax Officer, now finding that the stocks (opening and closing) are being systematically and regularly valued at lower rates, he has deemed it fit to accept the profits as shown by accounts, as according to him the accounts do show real profits. Under S. 13 of the Act, 'income, profits and gains shall be computed for the purposes of Ss. 10 (business), 11 and 12, in accordance with the method of accounting regularly employed by the assessee'. In this case the method of accounting has been found to be regularly and properly employed, hence the Income-tax Officer was prima facie entitled to accept the profits shown by the accounts .... At any rate the Privy Council decision nowhere forbids the Income-tax Officer to accept the profits shown by the accounts in future; as a matter of fact, the decision relates to one year only, and if the Income-tax Officer has now accepted the accounts, I think he was quite within his powers to do so for the discretion vests in him and it is absolute.

Perhaps, I should also remark here that the Income-tax Officer has not in this case put any fictitious values of stocks of goods of his own, nor has he thus taken any fictitious profits. As a matter of fact, the Company admits that they do not keep proper cost accounts and that the cost price worked out for revaluation of stocks is also approximate. Thus the revalued stocks also do not show real profits. What strikes me rather strange is that while the duly audited and certified balance sheet and profit and loss account according to the accounts of the Company is presented to the shareholders as representing the true state of affairs and real profits of the Company, the Company say to the Income-tax Department that the profits shown by them in their accounts and certified and duly audited balance sheet and profit and loss account is unreal.

Two important findings of fact are made in the letter of reference, viz. (1) the assessees have been found to have been regularly adopting all along the method of accounting which they followed for the year 1930, and (2) the method of valuation of stocks by taking some price under both cost and market price adopted for the year 1930 has been regularly employed by them for years past. This makes clear that the method of accounting regularly employed by the respondents comes within the meaning of S. 13, and it therefore became the duty of the Income-tax Officer to consider whether, in his judgment, the income, profits and gains for the purpose of S. 10 could be properly deduced from the accounts. In their Lordships' opinion it is abundantly clear that he never applied his mind to this question, but held himself entitled to hold the respondents to the figures of profit brought out in these accounts. The Assistant Commissioner took the same view, although he recognized that these figures did not show real profits. The views expressed by these two officers make it impossible to accept three statements by the appellant in the letter of reference, viz. (a) in para. 4:

After examination of the accounts, the Income-tax Officer being satisfied that the accounts showed the true income, profits or gains, accepted them;

(b) in para. 5 :

The Income-tax Officer however accepted as correct the profit of Rs. 2,64,086 as shown in the assessees' profit and loss account and considered that there was no need to revalue the stocks ;

and (c) in para. 8 :

The Income-tax Officer's finding was that the true income, profits and gains of the assessees could be properly deduced for the calendar year 1930 from the above method of accounts regularly employed by the assessees.

These statements are quite inconsistent with the statements already referred to, and further, the facts would seem to show that the Income-tax Officer could not reasonably have come to the conclusion that the profit shown in the profit and loss account was the true profit for income-tax purposes. It is found that the undervaluation in the 1930 accounts is of the same nature and on the same basis as that in previous accounts, which is referred to by the Assistant Commissioner as gross undervaluation. This is confirmed by the actual figures; taking the undervaluation of the closing stocks in the previous assessments, which, except in the present year, have been taken as the undervaluation of the opening stock in the succeeding assessment, the figures are as follows:

Year of Assessment.	Year of Account.	Under-valuation. Rs.
1927-28	1926	3,86,642
1928-29	1927	4,15,208
1929-30	1928	3,15,127
1930-31	1929	3,97,634

The last figure is that claimed by the assessees as the undervaluation of the opening stock in the accounting year of 1930, which is here in question. The Income-tax Officer could not reasonably conclude that the true profits could be properly deduced from a gross undervaluation. Lastly, if there were any doubt, the appellant himself has put the matter beyond possibility of doubt by the statement in his order of 16th April 1933, that the object of the undervaluation was the creation of a "secret" reserve, which involves the retention of profits so as not to be included in the profits shown to the shareholders by the profit and loss account and balance sheet, but which constitute part of the taxable profits. This negatives any suggestion that these accounts show the true profit for income-tax purposes.

Their Lordships desire to add that the view of the Assistant Commissioner that the Income-tax Officer is prima facie entitled to accept the profits shown by the accounts, where there is a method of accounting regularly employed by the assessee, is not a correct view. It is the duty of the Income-tax Officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on this question. It is clear that the Income-tax Officer acted on the same view as that expressed by the Assistant Commissioner, and did not perform the duty above stated. The case in 57 I A 21[1] is of no assistance on the present question. Their Lordships prefer the original question formulated by the High Court and embodied in the letter of reference, subject to the conclusion of their Lordships that the facts show that the method of accounting regularly employed by the assessees do not show the true income, profits or gains, and the question should therefore be amended as follows:

Whether in view of the provisions of S. 13, Income-tax Act or otherwise, the Income-tax Officer was right in computing for the purpose of S. 10 of that Act income, profits and gains in accordance with the method of accounting regularly employed by the assessee, when that method in fact does not show the true income, profits and gains.

This question falls to be answered in the negative. It will now be for the Income-tax Officer to proceed to the proper discharge of his duty under S. 13, in light of the opinions above expressed, and, doubtless, his experience in the preceding years' assessments will assist him in reaching a proper decision. Their Lordships will therefore humbly advise His Majesty that the order of the High Court of 28th March 1935 should be varied by substitution of the amended question above set forth, which should be answered in the negative, and that the appeal should be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellant — *Solicitor, India Office.*

Solicitors for Respondents — *Barrow, Rogers & Nevill.*

A. I. R. 1938 Privy Council 4

(From Bombay)

9th November 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Firm Harjivanlal Balkison — **Appellants.**

v.

Firm Radhakison Gopikison — **Respondents.**

Privy Council Appeal No. 4 of 1936.

Contract Act (1872), S. 65—Transactions entered by plaintiff with third person at defendant's instructions — Remittances by defendant appropriated to losses incurred — Suit by plaintiff for balance—Counter claim by defendant claiming amount so appropriated alleging transactions entered by plaintiff to be void — Claim falls under S. 65 —But claim cannot succeed as plaintiff has not received advantage within S. 65—Fact that there is no privity of contract between defendant and third person makes no difference.

Where in a suit for recovery of balance, in respect of transactions entered by the plaintiff with a third person, arrived at after appropriating to the losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65. But as the plaintiff has applied the amount or has become legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of S. 65. The fact that there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the liability to the third person in carrying out the defendant's instructions. [P 6 C 1, 2]

Sir Thomas Strangman and C. Bagram — *for Appellants.*

A. M. Dunne and J. M. Parikh — *for Respondents.*

Lord Thankerton.—This is an appeal from a decree dated 25th September 1934 of the High Court of Judicature at Bombay, Appellate Civil Jurisdiction, reversing a decree of that Court in its Original Civil Jurisdiction dated 27th July 1933. The present suit, which may be conveniently referred to as the Bombay suit, was brought by the respondents, a firm, against the appellants, a firm, on 15th January 1929, for the recovery of Rs. 3,219.4.6, as the balance due from the defendants in respect of certain transactions between the parties in cotton, wheat and silver and interest thereon up to the date of suit. The above balance was composed of Rs. 476.11.9 in respect of transactions during 1927.28 in cotton and Rupees 2,569.4.9 in respect of transactions in wheat and silver. The balance of Rupees 476.11.9 in respect of the cotton transactions was arrived at after appropriating to these transactions the remittances by the defendants amounting to Rs. 18,000 or thereby referred to in the counter-claim. At a late stage the defendants admitted liability in respect of the wheat and silver transactions, but they maintained a counter-claim for a refund by the plaintiffs of a sum of Rs. 18,154, which had been paid to them by the defendants in various amounts during the period over which the transactions took place.

The counter-claim had been made by the defendants in a supplemental written statement, filed on 3rd December 1929, in which they also challenged the cotton transactions as void in respect that they did not comply with the statutory form prescribed by the bye-laws of the East Indian Cotton Association Ltd., and were, therefore, rendered void by the provisions of the Bombay Cotton Contracts Act, (14 of 1922); and they maintained that accordingly the plaintiffs were not entitled to appropriate any of the defendants' moneys to the losses on such transactions, but were bound to return them to the defendants. The issue as to the validity of the cotton transactions, along with three of the other issues, which are not now material, was selected for trial in the first instance by Kemp J., who, by a judgment dated 18th February 1930, held the cotton transactions subsequent to 16th January 1928 to be void; on appeal, the High Court held, on 12th August 1930, that the whole of the transactions were void. By consent this decision followed the decision of the High Court in a similar suit also then before them, their decision in which was afterwards affirmed by His Majesty in Council: 60 I A 63.[1]

The suit having returned for trial of the remaining issues before Kania J., on 26th July 1933, the defendants, as already stated, admitted their liability for the wheat and silver transactions, and the plaintiffs proposed a new issue as to whether the counter-claim was barred by reason of the dismissal of Suit No. 113 of 1928 at Cawnpore, which may be conveniently referred to as the Cawnpore suit. The learned Judge disallowed the issue, on the ground that it was not pleaded, that it was too late, and that, although it was a question of law, it would require to be argued on facts which were not pleaded and for which the necessary documents were not disclosed. He further refused an application for amendment of the plaintiffs' reply to the counter-claim in order to raise the issue of res judicata, and he declined a tender by the plaintiffs of the plaint, written state-

1. Radhakisan Gopikisson v. Balmakund Ramchandra, (1933) 20 A I R P C 55=141 I C 828=60 I A 63=57 Bom 218 (P C).

ment and judgment in the Cawnpore suit as evidence. On 27th July 1933 Kania J. held that the plaintiffs were not entitled to any indemnity from the defendants in respect of the losses in the cotton transactions and that the defendants were entitled to recover under their counter-claim. He therefore dismissed the suit, and gave the defendants a decree for the amount of their counter-claim, which was agreed at the figure of Rs. 16,244-3-0.

On an appeal by the plaintiffs, the Appellate Court, on 13th March 1934, allowed the plaintiffs to amend their reply to the counter-claim so as to raise the plea of res judicata in regard to the counter-claim, and remanded the case to Kania J. for trial of the issue. On 31st August 1934, the case came on before Kania J., who delivered judgment in favour of the defendants, holding that the Cawnpore suit was confined to the question whether the defendants had lent money to the plaintiffs, whereas the counter-claim was for agency accounts. On appeal, the Appellate Court held in favour of the plea of res judicata and dismissed the counter-claim, and passed a decree in favour of the plaintiffs for Rs. 2,179-4-3. Rangnekar J. expressed the opinion that the case fell within S. 65, Contract Act, and that the plaintiffs were not bound to restore to the defendants moneys which the former had applied, or had become bound to apply, in carrying out the instructions of the defendants. The present appeal is by the defendants as appellants from that decree of the High Court and they ask for restoration of the decree of Kania, J. As in the opinion of their Lordships the appeal fails on the merits of the counter-claim, it will be unnecessary to express any decision on the plea of res judicata.

Their Lordships agree with Rangnekar J. that the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65, Contract Act, and that if the respondents have applied the Rs. 18,000 or have become legally liable to meet losses arising from the carrying out of the appellants' instructions, the respondents cannot be said to have received an advantage within the meaning of S. 65. The respondents employed a firm in Bombay, Chimaniram Motilal, to put through the cotton transactions in the market; it was admitted that there were no written contracts between them. The appellants sought to maintain (first) that the respondents had failed to prove their liability to Chimaniram Motilal and (secondly) that the contracts between the respondents and Chimaniram Motilal were void, in respect that they were not in writing, as required by bye-law 81 of the East Indian Cotton Association Ltd.

In their Lordships' opinion, neither of these contentions is now open to the appellants. The respondents proved that these transactions had been entered into with Chimaniram Motilal, and that the resulting losses had been debited as between them. The only points taken by the appellants were that these transactions had not been entered into on their behalf, and that they were void because they were not in conformity with bye-law 81. This is made clear by the refusal of Kania J. on 27th July 1933 to admit further evidence of the incurring of the liability to Chimaniram Motilal as unnecessary. The first point of these contentions is only now maintained to the extent that there was no privity of contract between the appellants and Chimaniram Motilal, but that would make no difference if the respondents have incurred the liability to Chimaniram Motilal in carrying out the appellants' instructions which is not now disputed. As regards the arguments before the Appellate Court, Rangnekar J. states :

> It was suggested that there was no clear evidence that the appellants paid over the sum to the firm of Chimaniram Motilal. But that there was a loss to the appellants which they were bound to make good to that firm is not challenged. Their liability to Chimaniram Motilal is not challenged, and on principle it makes no difference, particularly as they in fact appropriated the sums received from the respondents in their accounts, which are not challenged.

As regards the alleged invalidity of the contracts between the respondents and Chimaniram Motilal in respect that they were not in writing, this is clearly a matter which should have been raised in the pleadings and put in issue. It is not raised in the pleadings and is not the subject of an issue. As pointed out by Rangnekar J., there are contracts known as hedge contracts which do not require to be in writing, and the respondents were entitled to notice of such a contention, and the exact nature of the contracts in question should have been determined on evidence as to their circumstances. The learned trial Judge appears to have wrongly assumed that bye-law 81 necessarily applied to them, as is pointed out by Rangnekar J.

Under these circumstances this contention is not open to the appellants.

The appeal accordingly fails on the merits and it is therefore unnecessary to deal with the plea of res judicata, which raises some difficult questions. The Cawnpore suit was brought by the present appellants on 3rd September 1928 just over four months before the present suit was filed on 15th January 1929. The Cawnpore suit was dismissed on 4th April 1929. Three questions arise in this connection. In the first place, was that dismissal under R. 2 or R. 3 of O. 17 ? If it was under R. 2, the plea of res judicata is not available, but while the terms of the judgment would seem to suggest that the dismissal was under R. 3, it is not clear whether the granting of time had been before or after the first hearing. In the next place, the two cases were concurrent, and the amendment which added the plea was not applied for until after the respondents had allowed the issue as to the validity of the contracts to be finally determined, which might bring the case within those in which the Court should decline to allow the plea to be raised, on the ground that, though the issue might have been raised in the earlier suit, it could not be held that it ought to have been so raised, as both elements are necessary to the plea under Expln. 4 of S. 11, Civil P. C. Lastly, there remained the question as to whether the Appellate Court were right in overruling the refusal of Kania J. to allow the amendment at such a late stage in the case. Their Lordships express no opinion on any of these points.

It should be added that the appellants did not maintain that the payments should be appropriated in the account, which does not deal separately with the cotton, wheat and silver items, under the rule in (1816) 1 Mer 572,[2] as it would make no material difference in the result. Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dated 25th September 1934 should be affirmed, and that the appeal should be dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
T. L. Wilson & Co.

2. Clayton's case, (1816) 1 Mer 572.

* **A. I. R. 1938 Privy Council 7**

(*From Oudh : A. I. R. 1933 Oudh 309*)

2nd November 1937

LORD THANKERTON, LORD WRIGHT AND SIR GEORGE RANKIN.

Raja Ram—Appellant.

v.

Raja Bakhsh Singh and others—Respondents.

Privy Council Appeal No. 98 of 1934, Oudh Appeal No. 15 of 1933.

* **Hindu Law — Debts — Suit against sons and grandsons on mortgage executed by father — Suit decreed against sons as legal representatives of father but dismissed as against grandsons—Interest of grandsons in family property cannot be attached in execution of decree.**

A suit was instituted against sons and grandsons on a mortgage executed by a deceased father. The debt was not contracted for purposes regarded as immoral by Hindu law. The Judge, instead of decreeing the suit against sons and grandsons alike as representatives of the father, decreed it only against the sons as legal representatives of the father and dismissed it as against the grandsons:

Held that as the suit was dismissed as against the grandsons, S. 53, Civil P. C., was inoperative and the interest of the grandsons in the family property could not be attached in execution of the decree. [P 8 C 2]

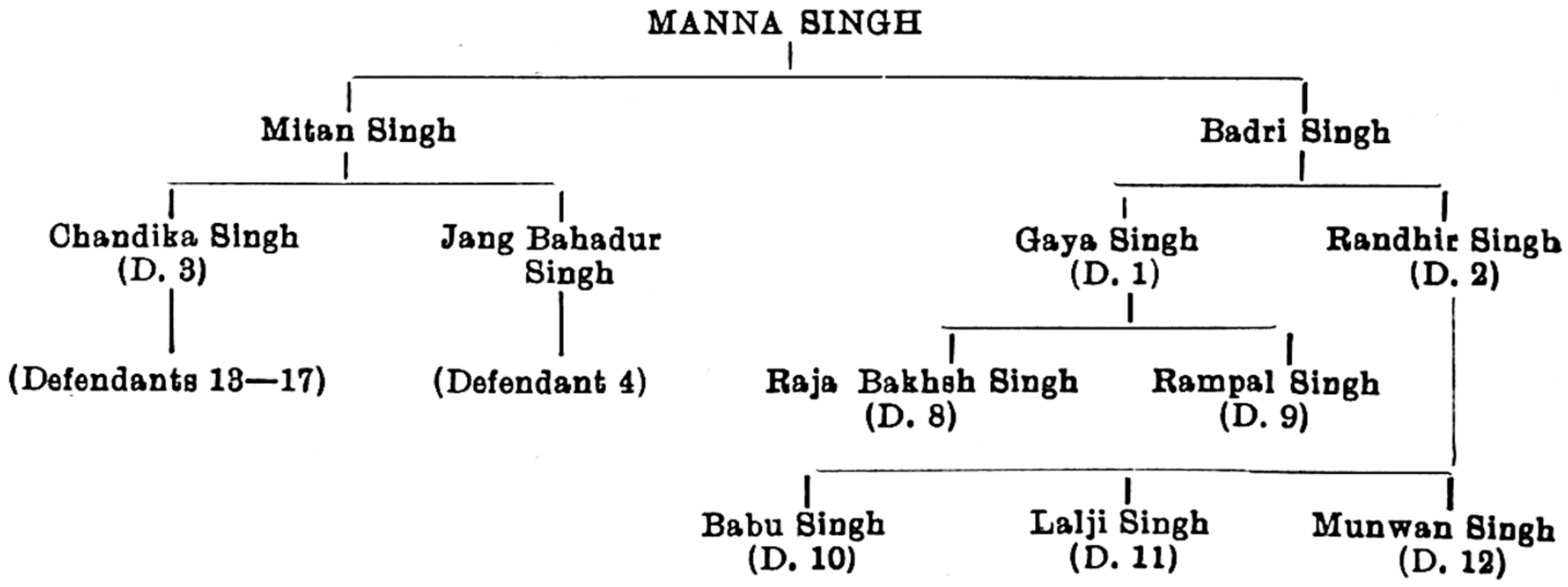
M. H. Rashid — *for Appellant.*

L. M. D. de Silva and Behari Lal Anantani — *for Respondents.*

Sir George Rankin.—On 15th November 1920, two persons named Badri Singh and Chandika Singh, members of a joint Hindu family governed by the Mitakshara, executed a mortgage deed in favour of the appellant, Raja Ram. Badri Singh having died, the appellant on 25th August 1930 brought a suit in the Court of the Subordinate Judge at Hardoi to enforce the mortgage. He impleaded 17 defendants. In addition to Chandika Singh (defendant 3) and other persons, he sued Badri Singh's two sons, Gaya Singh and Randhir Singh (defendants 1 and 2), and their five sons (grandsons of Badri Singh, defendants 8 to 12), who are now the five respondents to this appeal. The relationship of the defendants to the suit may be exhibited as follows : [*see next page*]

For reasons which may or may not have been valid, regard being had to the case made by the plaintiff, the decision of the Subordinate Judge, dated 13th May 1931, was as follows :

The result is that a simple money decree can only be passed on the basis of the deed in suit as



against the estate of Badri Singh and against defendant 3 personally.

I therefore decree the sum of Rs. 19,500 with costs, interest at the contract rate on Rs. 10,000 during the pendency of the suit and future interest at 6 p. c. p. a. on the entire decretal amount as against defendant 3 personally and against the estate of Badri Singh in the hands of defendants 1 and 2 under R. 1, O. 20 and R. 6, O. 9, Sch. 1, Civil P. C. The suit is dismissed as against the other defendants. Defendants 4, 7 and 8 to 17 will get their respective costs from the plaintiff.

On 15th May 1931, the appellant applied for execution of this decree, not only against Chandika Singh and the two sons of Badri Singh, but also against the present respondents and their interest in the family property, notwithstanding that they had been dismissed from his suit with costs. The latter objected that execution of the decree could not be had against them, but on 27th October 1931, the Subordinate Judge, on the ground that the whole family estate was liable for Badri Singh's debt, dismissed their objections and allowed execution to proceed. On appeal the Chief Court of Oudh set aside this order, and directed (27th February 1933) that the interest of the respondents in the family property be released from attachment. This is the decision of which the appellant complains.

Their Lordships are of opinion that the decision is correct. If the debt in question was not contracted for purposes regarded as immoral by the Hindu law, and if the respondents being grandsons of Badri Singh were liable therefor to the extent of their interest in the joint family property, then the Subordinate Judge's decree of 13th May 1931 was erroneous. The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the respondents, the Subordinate Judge should have given decree against them in like manner as against defendants 1 to 3, namely as representatives of Badri Singh, for a sum to be realised out of any property of Badri Singh come to their hands. Such a decree passed in accordance with S. 52, Civil P. C., would have attracted the operation of S. 53, and the respondents' interests in the joint property would have been liable to attachment under the decree, notwithstanding that such interests were not "property of the deceased" in the strict meaning of those words. The same result might have been attained in more ways than one, had the appellant recovered judgment against Badri Singh in his lifetime. But the interests of the respondents cannot be regarded as property of their deceased ancestor come to the hands of their coparceners, defendants 1 to 3 or any of them. The respondents having been dismissed from the suit with costs cannot be made liable under the decree. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellant — *Nehra & Co.*

Solicitors for Respondents — *Hy. S. L. Polak & Co.*

**** A. I. R. 1938 Privy Council 8**

(*From Lahore*)

9th November 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore — Appellant.

v.

Nawal Kishore-Kharaiti Lal — Respondent.

Privy Council Appeal No. 129 of 1936.

*** * (a) Income-tax Act (1922), Ss. 22, 43 — Assessee to be assessed as agent under S. 43 — Determination of question of agency can be postponed till assessment under S. 23 — Notice under S. 22 before such decision is valid initiation of proceedings under S. 43.**

It is open to the Income-tax Officer under the Income-tax Act to postpone any final determination of the question of agency until the time comes to make an assessment under S. 23, as the Act imposes no technical requirement in this connexion. It may be reasonable that an assessee, who is served with a notice under S. 22 (2) as an agent of a non-resident under S. 43, should not be required to render a return of the non-resident's income until it has first been decided that he is his agent ; on the other hand, having regard to the circumstances which for this purpose constitute agency, it may well be thought advisable that the information afforded by a return and by books of account produced in support thereof would be available for the purpose of deciding as to agency. The avoidance of delay may also be a consideration. Thus, if the notice under S. 22 is served before the expiry of one year from the financial year, it is a valid initiation of proceedings of the assessee as an agent under S. 43. Proceedings if begun in time are not by the Income-tax Act required to be completed within any time limit. [P 11 C 1]

*** (b) Income-tax Act (1922), S. 43—Notice under Proviso to S. 43 not mentioning any year for which assessee was to be treated as agent, but notice under S. 22 (2) specifying year—Assessment under S. 43 is not illegal.**

The notice is by S. 43 made part of the series of facts which results in the resident being deemed agent by force of the section. The extent of his responsibility if he be agent is another matter. If by notice given in due course under S. 22 (2) the year or years be specified, he has no grievance in point of procedure, and he can make his case upon merits. Thus the assessment made on an assessee as agent under S. 43 is not rendered illegal by the fact that the notice which the Income-tax Officer served on the assessee under the Proviso to S. 43 did not mention any particular year for which the Income-tax Officer proposed to treat assessee as an agent. [P 11 C 2]

A. M. Dunne and Hubert Hull — *for Appellant.*

L. DeGruyther and S. Hyam — *for Respondent.*

Sir George Rankin. — This appeal is brought from a decision of the High Court at Lahore by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces. On 8th June 1931, the Income-tax Officer at Delhi made an order under S. 23, sub-s. 3, read with S. 34, Income-tax Act 1922, whereby for the year of assessment, 1926-27, he assessed the respondent firm upon a 'total income' of Rs. 72,928 and determined that the tax payable thereon was Rs. 6,837. This assessment order was made upon the respondent firm whose name and style is Nawal Kishore-Kharaiti Lal and who carry on business as jewellers at Delhi, but it was made upon them as agent for a Hindu undivided family resident in the State of Jaipur outside British India. One Seth Banji Lal had been head of this family, but had died in December 1928. The validity of this assessment order is in substance the matter in dispute between the parties, but the case comes before their Lordships as an appeal by special leave from the judgment of the High Court upon a reference made under S. 66 of the Act formulating three questions of law for the High Court's decision. As these questions challenge the procedure adopted by the Income-tax authorities, it will be convenient to state first the steps which they had taken and then the objections raised by the respondent firm. Ss. 34, 42 (1) and 43 of the Act are the provisions of chief importance in the case :

34. If for any reason income, profits, or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

42 (1). In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connexion or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax :

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India.

43. Any person employed by or on behalf of a person residing out of British India, or having any business connexion with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent :

Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

On 2nd February 1928 the Income-tax Officer served the respondent firm with a notice in the following terms :

You are hereby required to attend this Court on 9th February 1928, and show cause why you should not be treated as agents of Seth Banji Lal of Jaipur State for income-tax assessment purposes.

This notice did not specify any particular year of assessment. It was headed "Notice under Proviso to S. 43, Income-tax Act of 1922". On 13th February the Income-tax Officer recorded as follows :

Mr. Chatar Behari Lal present. Heard. S. 22 (2) notice with necessary forms served on him for 1926-27 (S. 34) and 1927-28 for Nawal Kishore Kharaiti Lal, agents of S. Banji Lal.

The respondent firm on 12th March filed a blank return under protest and lodged a petition of appeal against the order of 13th February before the Assistant Commissioner. This appeal, which purported to be brought under S. 30 of the Act, was not in their Lordships' view within the terms of that section, but the Assistant Commissioner did not dismiss it on that ground. He considered, as their Lordships read his order of 2nd May 1928, that the Income-tax Officer's order of 13th February did not purport to decide that the respondent firm were agents of Seth Banji Lal. About a year later, namely on 5th April 1929, a notice under S. 23 (2) of the Act was sent to the respondent firm as agent for Seth Banji Lal requiring them to attend at the Income-tax Officer's office and to produce evidence in support of the return which they had rendered. This notice specified the year 1926-27 as well as 1927-28. Nothing appears to have been done under this notice or for two years afterwards, a fact which may be explained by the circumstance that the assessment in respect of previous years was being disputed. On 5th May 1931, however, two things happened. The respondent firm filed a fresh return in respect of the year 1926-27 showing a sum of Rs. 51,550 as interest on loans payable by them to Seth Banji Lal of Jaipur. The Income-tax Officer on the same date served a notice on the respondent firm stating that it was proposed to treat them as the agent of Seth Banji Lal for the year 1926-27. 8th May 1931 having been appointed for hearing any objections to this course, the Income-tax Officer on that date recorded an order against the respondent firm as follows :

They pay interest to the non-resident on his deposits with them. The non-resident has thus business connexions with them and is in receipt of income through them. I accordingly hold them as agent for Seth Banji Lal of Jaipur under S. 43 for the assessment for 1926-27.

The assessment order of 8th June 1931 included, besides the sum of Rs. 51,550 admitted to be payable by the respondent firm, two other items of interest payable by other persons to Seth Banji Lal, bringing the "total income" to the figure of Rs. 72,928 already mentioned. An appeal to the Assistant Commissioner having been dismissed on 19th August 1931, application was made to the Commissioner under S. 66 of the Act to state a case to the High Court. On 14th May 1932 the Commissioner referred to the High Court three questions as follows :

(1) Whether in the circumstances of this case, the petitioner could be held to be an agent for Seth Banji Lal within the meaning of S. 43 ? (2) Whether the assessment made on the firm of Nawal Kishore-Kharaiti Lal of Delhi (the petitioner) as agent of Seth Banji Lal of Jaipur under S. 43 is rendered illegal by the fact that the notice which the Income-tax Officer served on the firm under the Proviso to S. 43 did not mention any particular year for which the Income-tax Officer proposed to treat the firm as an agent. (3) Whether proceedings could be started under S. 34 of the Act against the petitioner as agent of the non-resident in view of the fact that action under that section was time-barred, more than one year having lapsed since the issue of the notice, dated 2nd February 1928 ?

As required by the Act, the Commissioner gave his opinion on each question, answering each against the respondent firm—namely (1) Yes ; (2) No ; (3) Yes. The High Court (Addison and Sale JJ.) answered the first and third questions in the negative and held that the second question did not arise. Their view was that the Assistant Commissioner, having by his order of 2nd May 1928 held that no order had been passed declaring the respondent firm to be the agent of the non-resident, the income-tax authorities were bound by that opinion. On this footing there was no order declaring the respondent firm to be such agent until 8th May 1931. No such order having been passed before 13th February 1928, the notice of that date calling for a return of income under S. 22 (2) was in the opinion of the learned Judges invalid, and as this was the only notice ever served under that sub-section, the assessment was illegal

as well as out of time under S. 34. They concluded their judgment by saying :

> The result of this reference is that the petitioner will escape assessment of income-tax for the year 1926-27 on a technicality.

The first question for decision is whether by the terms of the Act it is necessary to the validity of a notice calling for a return of income under S. 22 (2), where it is served upon a person as agent of a non-resident under S. 43, that it should have been preceded, not only by the notice of intention prescribed by S. 43 and by the opportunity of being heard prescribed by the proviso thereto, but also by an order to the effect variously described by the High Court as "declaring the petitioner to be the agent of a non-resident person" and "treating him as such agent". It may be reasonable that *A* should not be required to render a return of *B's* income until it has first been decided that he is agent for *B* : on the other hand, having regard to the circumstances which for this purpose constitute agency, it may well be thought advisable that the information afforded by a return and by books of account produced in support thereof should be available for the purpose of deciding as to agency. The avoidance of delay may also be a consideration. The matter must be determined entirely upon the language of the Act, and their Lordships cannot find that it imposes the technical requirement upon which the High Court have insisted. It seems to their Lordships to be open to the Income-tax Officer under the Act to postpone any final determination of the question of agency until the time comes to make an assessment under S. 23 of the Act. The notice of 13th February 1928 was served before the expiry of one year from the end of the financial year 1926-27. Subject therefore to the merits of the case and to the answer to be given to the second of the three questions referred, the notice of 13th February was a valid initiation of proceedings to assess the respondent firm as an agent under S. 43 and in respect of the year of assessment 1926-27. Proceedings if begun in time are not by the Act required to be completed within any time limit.

The objection taken by the second question is that the notice of 2nd February 1928 did not specify the year 1926-27 though this was done by the notice of 13th February requiring returns to be made under S. 22 (2). It would appear that in 1931 the then Income-tax Officer had some doubt upon this point, and that the issue of a second notice on 5th May 1931, specifying 1926-27 was intended to meet the difficulty. If, however, the original notice of 2nd February 1928 had been for this reason bad, that of May 1931 was much too late to take its place or cure it. The High Court did not think it necessary to answer the second question referred to them, but in their Lordships' view it should be answered, and the answer is in the negative. The notice is by S. 43 made part of the series of facts which results in the resident being deemed agent by force of the section. The extent of his responsibility, if he be agent, is another matter. If by notice given in due course under S. 22 (2) the year or years be specified, he has no grievance in point of procedure and he can make his case upon the merits.

No question of law arises upon the controversy as to agency. At the hearing it was desired by learned counsel for the respondent firm to contend that his clients should not have been assessed upon the figure of Rs. 72,928, which includes interest payable to the non-resident by third parties in British India, but only upon the figure of Rs. 51,550 which was payable by the respondent firm. No such issue can be brought within any of the three questions referred by the Commissioner to the High Court nor has it been discussed at any previous stage of the reference. Their Lordships are accordingly unable to entertain it. They will humbly advise His Majesty that this appeal should be allowed, that the judgment of the High Court be reversed and that in lieu of the answers given by the High Court to the three questions referred to them by the Commissioner, the following answers be respectively given : namely Question (1) Yes ; Question (2) No ; Question (3) Yes. The respondent firm will pay the appellant's costs of this appeal and of the reference in the High Court.

V.B.B./R.K. *Appeal allowed.*

Solicitors for Appellant —
Solicitor, India Office.

Solicitors for Respondent —
Sanderson Lee & Co.

A. I. R. 1938 Privy Council 12

(*From Patna : A. I. R. 1934 Pat 507*)

16th November 1937

LORD THANKERTON, LORD ALNESS AND SIR LANCELOT SANDERSON.

Secretary of State — Appellant.

v.

Sunderji Shivji & Co. and others — Respondents.

Privy Council Appeal No. 15 of 1937, Patna Appeal No. 20 of 1934.

(a) Railways Act (1890), Ss. 55 and 56— 'Public auction' — Meaning — Sale proclamation made and notice of proposed sale placed on notice-board of station—Sale not held in public but offers made to station master and highest offer accepted — Sale held not by public auction.

The words "public auction" in Ss. 55 and 56 must bear the meaning which is ordinarily given to them in the English language. The words mean a public sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder. This involves the auction being held in public, all members of the public having a right to attend, and a valuable element being the competition between the persons who are openly bidding for the subject matter of the sale. This is of importance not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price. [P 15 C 1]

Where notice of the intended sale of coal was given by Railway Company by proclamation and notice on the board at the station and some offers were sent to the station master which were forwarded by him to the superior officer who directed him to accept the offer which was in fact the highest :

Held there was no public auction in the ordinary meaning of the words : there was no sale in public, there was no opportunity for competitive bidding : in fact, what was done bore no resemblance to a "public auction". The Railway Company did not sell the coal in the manner prescribed by the sections, and therefore could not rely on the protection given by the Railways Act. [P 15 C 1]

(b) Railways Act (1890), Ss. 55 and 56 — Notice of proposed sale by public auction— Sufficiency—Essentials.

A notice of an intention to sell at a public auction cannot be sufficient or effective, unless it specifies the time and place of the proposed public auction, the nature of the goods intended to be sold and all other particulars necessary to enable the members of the public to appreciate what it is which it is intended to put up for sale at the public auction. [P 15 C 2]

H. V. Willink and W. Wallach — *for Appellant.*

Respondents ex parte.

Sir Lancelot Sanderson.—These are two consolidated appeals against the decrees of the High Court of Judicature of Patna dated 4th July 1934. The first appeal relates to a suit brought in the Subordinate Court of Dhanbad exercising Small Cause Court jurisdiction in which Sunderji Shivji & Co. sued the Secretary of State for India in Council representing the East Indian Railway and North Western Railway for damages for the conversion of certain coal, of which the plaintiffs claimed to be the proprietors. The other appeal relates to a suit brought by Deoji Shivji & Co. against the Secretary of State representing the East Indian Railway and the Bengal and North Western Railway Company in the above-mentioned Court in which a claim of a similar nature was made in respect of certain coal which the plaintiffs alleged had been sold by the Railway administration in a manner which was illegal, irregular and ultra vires. The Small Cause Court Judge dismissed both suits with costs. The plaintiffs in both suits applied to the High Court under S. 25, Provincial Small Cause Courts Act for revision. The applications were disposed of in one judgment, by which the High Court held that the plaintiffs in both suits were entitled to succeed and decreed the suits for the amounts claimed with costs. Leave to appeal to His Majesty in Council was granted to the Secretary of State and the Bengal and North Western Railway Co. Ltd. for although the amount claimed in each suit was small, the learned Judges of the High Court held that the cases were fit for appeal under S. 109 (c) of Act 5 of 1908 as substantial questions of law were involved. The plaintiffs in the two suits were not represented at the hearing of the appeals before their Lordships. The same important question arose in both cases, and related to Ss. 55 and 56, Indian Railways Act (9 of 1890). They are as follows :

55.—(1) If a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession ; (2) When any animals or goods have been detained under sub-s. (1), the railway administration may sell by public auction, in the case of perishable goods at once, and in the case of other goods or of animals on the expiration of at least 15 days' notice of the intended auction, published in one or more of the local newspapers, or, where there are no such newspapers, in such manner as the Governor General in Council may prescribe, sufficient of such animals or goods to produce a sum equal to the charge, and all expenses of such detention, notice and sale, including in

the case of animals, the expenses of the feeding, watering and tending thereof ; (3) . . . ; (4) . . . ; (5) . . .

56.—(1) When any animals or goods have come into the possession of a railway administration for carriage or otherwise and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him, requiring him to remove the animals or goods ; (2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the animals or goods as nearly as may be under the provisions of the last foregoing section, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto.

In both suits the Secretary of State relied upon the provisions of the above-mentioned sections as protecting him from any liability in respect of the acts of which the plaintiffs complained. The learned Judges of the High Court in their judgment dealt with the applications for revision upon the facts which were proved in the first of the above-mentioned suits, stating that the facts in the two cases were similar in so far as they were material for their decision. Their Lordships propose to adopt the same course. The material facts in the first suit are as follows : The plaintiffs are coal merchants carrying on business at Jharia. On 8th March 1929, Messrs. Villiers, Ltd., who were the managing agents of Bagdiji Colliery, acting on behalf of the plaintiffs, consigned a wagon of coal to Sikri Brothers : the destination, described in the declaration note of the East India Railway, was Doaba : this was a mistake. The wagon should have been sent to Adampur. The wagon of coal was received at Doaba on 26th March 1929, and it appears that on 15th April 1929, a letter in the following terms was sent by the Railway Company's agent at Lahore to the consignees, viz. Sikri Coal Merchants at Lahore :

DEAR SIRS,

Please take notice that the following consignment of coal booked to your address is lying undelivered at the station named below and that the wharfage is due to the railway on it up to date. You are now given this final notice and warning that if within 15 days from date the consignment of coal is not taken delivery of and coal removed from railway premises on payment of full wharfage and all other charges due, we reserve to ourselves the right to take civil action against you for recovery of all charges including wharfage. If the consignment is not removed within 15 days from date, it will be sold by public auction under Ss. 55 and 56, Railways Act (9 of 1890) at your risk. The coal is being advertised for sale.

Invoice No. 1. Railway Receipt No. 27940.
Station from Pathardih. Station to Doaba.
Weight in tons 21 cwts. 13. Dated 18th March 1929.
Coal Wagon No. 14714 Railway freight Rupees 342-3-0.

On 22nd April a letter was sent to the consignors, Messrs. Villiers Ltd at the Bagdiji Colliery, asking for instructions regarding the disposal of the coal, and stating that if delivery was not effected within a week of the receipt of the letter and all charges due thereon paid, arrangements would be made to dispose of the same under Ss. 55 and 56, Railways Act (9 of 1890). On 26th April 1929, Messrs. Villiers Ltd. sent to the plaintiffs a copy of the letter which they had received from the railway company and asked for instructions. On the same date Messrs. Deoji Shivji & Co., the plaintiffs in the second suit, wrote to the Railway Company's Agent at Lahore the following letter:

P. O. Jharia,
(Manbhum).
Dated the 26th April 1929.

Devji Shivji & Co.,
Colliery Agents.
Best Bengal Coal Suppliers and Contractors.

The Agent, North-Western Railway, Lahore.

DEAR SIR,

Pathardih to Doaba Bagdigi Slack Wagon No. 14714 Con. Sikri Bros.

With reference to your letter No. 208/P/CC/29 of the 15th inst. to Messrs. Sikri Bros., Lahore, please note that the wagon was misdespatched to Doaba and hence we had to hand over the R/R to Messrs Punjab United Coal Co., who state that on account of heavy wharfage occurred they could not take delivery.

We shall thank you if you will please instruct the station master, Doaba, to deliver the consignment free of wharfage so that the delivery may be effected and thanking you in anticipation.

Yours faithfully,
Deoji Shivji & Co.

Negotiations by the Punjab United Coal Company for delivery free of wharfage charges came to nothing. There was no local newspaper at Doaba, so on 27th June 1929, there was inserted in the Civil and Military Gazette which was published at Lahore a notice in the following terms :

NORTH-WESTERN RAILWAY.

SALE OF UNCLAIMED PROPERTY.

Notice is hereby given that unless the undermentioned consignments lying undelivered are removed on payment of all charges due before 16th

July 1929, they will be sold by public auction and the sale proceeds disposed of in terms of Ss. 55 and 56, Railways Act 9 of 1890.

Then followed a list of 21 consignments which had been sent from various stations to other stations, giving in each case the numbers of the invoice and the railway receipt, the date, the number of the wagon the names of the sender and of the consignee. The consignment in question was one of the items : the information relating thereto was that it had been sent from Pathardih to Doaba by Villiers Co. to Sikri Brothers on 18th March 1929: the numbers of the invoice, railway receipt and the wagon were given. It is to be noted that in the above-mentioned notice there was no information given as to the nature of the consignments, or of the time or place of the public auction referred to in the notice. It appears that the notice of the proposed sale was proclaimed locally at Doaba and a copy thereof was posted on the station notice board.

Delivery of the wagon of coal was not taken, and the station master at Doaba under instructions from the Chief Commercial Manager of the Railway Company endeavoured to sell the coal for a sum which would be at least sufficient to cover the freight charges due on the consignment. The result of the station master's efforts was that the highest offer for the coal was Rs. 40, which the above-mentioned Manager refused to accept. The station master was then directed by the manager to send the wagon to Mogalpura: this was done and the wagon arrived at Mogalpura about 18th August 1929. At Mogalpura there was "a sale proclamation", as it was called, in the bazaar and notice of ths proposed sale was placed on the notice board at the station. Certain persons made offers to the station master at Mogalpura and eventually the sum of Rs. 205, which was the highest offer, was accepted by the Chief Commercial Manager of the Railway Company and the coal was sold for that price. Notice of the sale was sent by the Railway Company to Messrs. Villiers Ltd. in a letter dated 15th September 1930, in the following terms:

To

The Manager,
Messrs. Villiers Limited,
Bagdigi Colliery, post Jharia.
Pathardih to Doaba Jun. (?).
No. one of 10-3-29 Wg. No. 14714.

The above consignment having been sold for Rs. 205 a sum of Rs. 1,170-4-0 is still due to the Railway on account of freight, wharfage and advertisement charges, vide details below:

	Rs.	a.	p.
Invoiced freight	328	4	0
Sale proceeds	205	0	0
Loss in freight	123	4	0
Demurrage	—		
Wharfage	1,044	0	0
Advertisement charges ...	3	0	0
Total	1,170	4	0

This is to advise you that I am agreeable, strictly without prejudice to our claim for the entire amount, to forgo amount of wharfage and shall look to you to make good the loss in freight Rs. 123-4-0 and the out-of-pocket advertisement cost, viz. Rs. 3. (Total Rs. 126-4-0) if the consignee do not pay.

Please acknowledge.

Yours faithfully,
(Sd.) .....
Offg. Dist. Traffic Manager, Coal.
(Sd.) Illeg., 18-9-30.

Messrs. Villiers, Ltd. paid the sum of Rs. 126-4-0 to the Railway Company, and subsequently recovered the amount so paid from the plaintiffs. That sum was an item in the total amount claimed by the plaintiffs against the Secretary of State, viz. Rs. 256-13-6 as damages for the alleged wrongful conversion of the coal by the Railway Company. It was contended on behalf of the appellant, the Secretary of State, that the above-mentioned acts of the Railway Company constituted a compliance with the provisions of Ss. 55 and 56, Indian Railways Act, and that consequently the Railway Company was not liable to the plaintiffs for any compensation or damages in respect of the sale of the coal.

This was the only point raised for their Lordships' consideration. It was argued that as there was no local newspaper at Doaba or Mogalpura, and as the Governor-General in Council had not prescribed any manner for the publication of the notice referred to in S. 55, the Railway Company had taken all such steps as could reasonably be required to give notice of the intended sale by public auction. It is not necessary to consider that part of the case in any detail, for in their Lordships' opinion the first question to be considered and decided is whether there was in fact any public auction of the coal. It was contended on behalf of the Secretary of State that there was such a public auction. In their Lordships' opinion it is

clear that whether the right of the Railway Company to sell the coal arose by reason of S. 55 (2) or by reason of S. 56 (2), the sale should have been by public auction and in no other way. It is true that in S. 56 (2) it is provided that the Railway Company is to "sell the goods as nearly as may be under the provisions of the last foregoing section", but no suggestion has been made that there were any facts in this case which would prevent the Railway Company from selling by means of a public auction in the event of the Company putting in force the right to sell given to the Railway Company by S. 56 (2).

There is no definition in the Act of the words "public auction" and their Lordships are of opinion that there can be no doubt that they must bear the meaning which is ordinarily given to them in the English language. The words mean a public sale at which each bidder offers an increase upon the price offered by the preceding bidder, the article put up being sold to the highest bidder. This involves the auction being held in public, all members of the public having a right to attend, and a valuable element being the competition between the persons who are openly bidding for the subject matter of the sale. This is of importance not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price.

Their Lordships are of opinion that in this case there was no public auction of the coal in question. Notice of the intended sale was given in the manner already mentioned, by proclamation and notice on the board at the station, and some offers were sent to the station master at Mogalpura, which were forwarded by him to his superior officer who directed him to accept the offer of Rs. 205 which was in fact the highest. But there was no public auction in the ordinary meaning of the words: there was no sale in public, there was no opportunity for competitive bidding: in fact, what was done bore no resemblance to a "public auction". This conclusion is sufficient to dispose of the appeal, for the Railway Company did not sell the coal in the manner prescribed by the above-mentioned sections, and therefore the Railway Company cannot rely on the protection given by the Act.

As already stated, the question of the sufficiency of the notice was referred to in the course of the argument, and while their Lordships in view of the conclusion already mentioned do not consider it necessary to give any decision on that part of the case, they are of opinion that it is difficult to see how a notice of an intention to sell at a public auction can be sufficient or effective, unless it specifies the time and place of the proposed public auction, the nature of the goods intended to be sold and all other particulars necessary to enable the members of the public to appreciate what it is which it is intended to put up for sale at the public auction. Their Lordships were informed that the facts relating to the second appeal were not exactly the same as in the first appeal, but that they were similar to those in the first appeal in all material respects, and that the decision in respect of the first would govern the second appeal. Their Lordships therefore are of opinion that the two appeals should be dismissed and they will humbly advise His Majesty accordingly.

D.S./R.K. *Appeals dismissed.*

Solicitors for Appellant — *Solicitor, India Office.*

Respondents ex parte.

A. I. R. 1938 Privy Council 15

(*From Bombay* : *A. I. R. 1936 Bom. 356*)

19th November 1937

LORD THANKERTON, LORD WRIGHT AND SIR GEORGE RANKIN.

Ford Motor Company of India Ltd. — Appellants.

v.

Secretary of State — Respondent.

Privy Council Appeal No. 114 of 1936.

(a) Sea Customs Act (1878), S. 30—Price defined by Cl. (a) can be arrived on basis of actual price.

The word 'ascertainable' in Cl. (b) of S. 30 imports more than could be satisfied by the result of a mere estimate. On the other hand the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by Cl. (a) upon the basis of an actual price, though some adjustment may be needed to eliminate the difference, e. g. between cash and a month's credit. [P 18 C 1]

(b) Sea Customs Act (1878), S. 30—Import of cars—Distributor paying price notified in current price list before delivery — Delivery f. o. r. made within few days of arrival of cars — Price to distributor held wholesale cash price relating to sale at time and place of importation—Overhead charges held did not affect question.

The appellants, importers into India of cars, issued from time to time a price list; and the terms of business between them and the distributors of such cars were that the retail price to be charged by the distributor to the public was that stated in the price list current at the time of arrival of the vehicles in India and the price payable by the distributor to the appellants was the same price less a certain discount. The distributor had to pay this price before obtaining delivery. Delivery was given by the appellants "free on rail," save in the case of the authorized dealers for the district of Bombay itself, viz. Ford Automobiles (India), Ltd., to whom delivery was made at their own warehouse in Bombay. The price mentioned in the price list was in all cases for a vehicle in running order, and the same was true of the contract between the appellants and the distributors :

Held that the appellants' price to their distributors was a wholesale price within the meaning of S. 30. It was a cash price. The cars were invoiced a few days before arrival of the ship and the price became fixed then and not before. The sales were therefore sales at the time and place of importation in every reasonable sense.

[P 18 C 1, 2; P 19 C 1]

Held further that the overhead charges had no bearing upon any matter arising under Cl. (a) of S. 30. [P 19 C 1]

(c) Sea Customs Act (1878), S. 30 (a) — "Goods of the like kind and quality" — Existence of wholesale cash price for goods themselves under assessment at time and place of importation - Cl. (a) is not made inapplicable for want of sales of other goods.

The application of Cl. (a) of S. 30 does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily, at the time of making out the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of Cl. (a). As a rule, therefore, the price appropriate to the goods under assessment will under the clause be deduced, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a "wholesale cash price less trade discount", the clause is not inapplicable for want of sales of other goods. The goods under assessment may under Cl. (a) be considered as members of their own class even although at the time and place of importation there are no other members and the price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. [P 19 C 1, 2]

Sir William Jowitt and Sir Thomas Strangman — *for Appellants.*

A. M. Dunne, H. St. John Field and T. F. R. McDonnell—*for Respondent.*

Sir George Rankin. — The appellants are the Ford Motor Company of India, Limited. They import Ford Motor vehicles into India from Canada, and the questions raised by this appeal relate to the amount of customs duty payable upon 256 Ford motor cars consigned to the appellants which arrived in Bombay by the S.S. "ALGIC" on or about 9th January 1929. The facts are not in dispute. The appellants have a monopoly of the supply of Ford vehicles to India. Save that they sometimes sell direct to their own employees or to Government, they sell in India only to authorized dealers or distributors. Each distributor has a particular district within which he is the sole agent for or retail seller of Ford vehicles. The appellants obtain from the distributors information as to their future requirements and place consolidated orders accordingly once or twice a month with the manufacturers in Canada. The evidence of the appellants' director (Mr. Gordon Edward Corey), the only witness called at the hearing of the suit, was as follows :

Our orders are placed normally once a month. That order covers our requirements for one month —two or three months following our order. After they [Ford (Canada)] receive the order they must build the car and a month is required for passage time. We sell to the dealers in large quantities Ford vehicles and all parts relating thereto. We sell to the dealers all over India, Burma and Ceylon.

The appellants issue from time to time a price list ; and the terms of business are that the retail price to be charged by the distributor to the public is that stated in the price list current at the time of arrival of the vehicles in India, and the price payable by the distributor to the appellants is the same price less a discount of 20 per cent. The distributor has to pay this price before obtaining delivery. Delivery is given by the appellants "free on rail", save in the case of the authorized dealers for the district of Bombay itself—viz. Ford Automobiles (India), Limited — to whom delivery is made at their own warehouse in Bombay. The price mentioned in the price list is in all cases for a vehicle in running order, and the same is true of the contract between the appellants and the distributors. Each of the cars now in question arrived in India packed in a case, but incompletely assembled in respect that the battery had to be charged and fixed, the wheels, mudguards, and running boards to be fixed, and other items of work done to put the vehicle in running order. Having no facilities for doing such work in Bombay, the appellants gave delivery of the cars in the state in which they had arrived, making an agreed allowance to

their distributors against the price. For each car the allowance was 13 rupees 8 annas. Uuder the second Schedule to the Indian Tariff Act (8 of 1894) as it stood in 1929, motor cars were chargeable with a customs duty calculated at 20 per cent. of the "real value" as defined by S. 30, Sea Customs Act (8 of 1878). The section is as follows :

Section 30.—For the purposes of this Act the real value shall be deemed to be : (a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or (b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid.

The 256 Ford motor cars [Model A Vehicles] which arrived by the S. S. "ALGIC" in January 1929, were assessed to customs duty by the Collector of Customs upon the view that Cl. (a) of S. 30 applied to the case, and that the price charged by the appellants to the distributors, excluding therefrom the allowance of Rs. 13-8-0, was such a wholesale cash price as is specified therein. The appellants disputed this assessment, contending that for the motor cars in question there was no such wholesale cash price ascertainable, that the duty should have been assessed under Cl. (b) of S. 30, and that in any event the appellants' price to their distributors was attributable in part to work done or services rendered after the importation of the goods. On 12th September 1929 the appellants, having on 22nd March 1929 paid under protest the sum of Rupees 81,986-9-0 claimed by the Customs authorities, sued the Secretary of State in Council in the High Court of Bombay for a return of Rs. 15,118-11-0 as duty overpaid and for certain declarations as to the correct basis of assessment. The learned trial Judge, Tyabji J., held (21st January 1935) that the motor cars were in the circumstances assessable under Cl. (a) of S. 30, but that duty was only payable upon the basis of the appellants' price to the distributors, provided that deductions therefrom were made so as to reduce it to an "ex ship" price. With this object he reduced the figure by making two deductions—(a) for the cost of carriage from the dock to the place of delivery and (b) for the appellants' overhead charges in respect of the assembling of the cars after importation. The parties agreed that upon the view taken by the learned Judge the amount of customs duty overpaid was Rs. 454-9-0. Upon appeal by both parties to a Division Bench, it was held that the assessment made by the Customs authorities was correct and the appellants' suit was dismissed with costs (4th October 1935).

On behalf of the appellants, stress has been laid upon certain features of their business. They have from the first insisted that Ford cars are in a class by themselves and cannot be regarded as of the like kind and quality as other cars. To the fact that the appellants are the sole importers of such cars, they attribute important consequences, contending that in such a case the only wholesale price is the f.o.b. price at the port of shipment plus the charges for freight and insurance—in effect the price c.i.f. Bombay. It is further said that they have at any given time ascertained beforehand the whole requirements of the distributors, so that each consignment from Canada brings the Indian market to saturation point, with the result that the price given for the goods actually imported affords no indication of the price at which any other Ford cars could be sold. The exact prices obtainable by the appellants are, it is contended, accounted for in part by the appellants' system of price control through "sole agents" for different districts, and their sales to their distributors are not in the circumstances evidence of any market value or any general wholesale price obtainable for a Ford car as soon as it has been landed in Bombay. It is accordingly maintained that while there may be cases in which the fact that certain cars are sold for a given price is good ground for inferring that similar cars would fetch the same amounts, no such inference can here be made. The wholesale cash price of Cl. (a) is meant, it is said, to be a price for hypothetical goods and to be independent of particular circumstances affecting the goods imported : so that the clause can operate only in the case of staple articles for which there is a market price or price current ascertainable from day to day. In support of this view the observations of Lord Blanesburgh delivering the judgment of the Judicial Committee in 59 I A 258[1] at p. 266 are called in aid :

1. Vacuum Oil Co. v. Secy. of State, (1932) 19 A I R P C 168=137 I C 535=59 I A 258=56 Bom 313 (P C).

The wholesale cash price primarily in view is that price current for staple articles, the amount of which if not a subject of daily publication in the Press, is easily ascertainable in appropriate trade circles.

It is for these reasons denied that in January 1929 there was for Ford cars any wholesale selling price in Bombay which could be taken as the basis of assessment, and it is objected that to assess the cars upon the appellants' price to the distributors is to exact customs duty upon the appellants' profits and to put Ford cars at a disadvantage as against cars which are sold retail by the importers.

These are formidable contentions and they must be tested by the language of the statute. It is reasonably plain in limine that if such a wholesale price as satisfies the description contained in Cl. (a) of S. 30 is ascertainable, the goods cannot be dealt with under Cl. (b), and the statute is not consistent with the view that the importer's profits should in that case be excluded from the assessable value. The price to be ascertained is "a wholesale cash price less trade discount for which goods of the like kind and quality are sold or are capable of being sold at the time and place of importation". In the application of S. 30 to the facts of a given case, something may depend upon the exact force attributed to the requirement that the price must be "ascertainable". The word imports more than could be satisfied by the result of a mere estimate. On the other hand, the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by Cl. (a) upon the basis of an actual price, though some adjustment may be needed to eliminate the difference, e.g. between cash and a month's credit.

If the facts of the present case and the terms of Cl. (a) be placed side by side for comparison, several points of exact agreement become clear. The appellants' price to their distributors is a wholesale price within the meaning of the section as declared in 59 I A 258.[1] It is a cash price : payment was made before delivery and delivery was within a few days of the arrival of the goods. The only discount has been deducted. It is not now contended that the cars were sold at the time (September or October 1928) when the distributors made known their requirements to the appellants. The cars were invoiced a few days before arrival of the ship and the price became fixed then and not before. The sales were therefore sales at the time of importation in every reasonable sense. The question whether the price which they fetched relates to a sale "at the place of importation" gave rise to a difference of opinion between the Indian Courts. The trial Judge was much influenced by what Lord Blanesburgh in the case already cited had said as to the price being "relieved of the loading representing post-importation expenses". He held that only a sale "ex ship" satisfies the exact requirements of Cl. (a). On the other hand, both Judges of the Appellate Bench held that a sale at Bombay with delivery f.o.r. Bombay complied fully with a reasonable interpretation of the clause. Their Lordships are in agreement with the Appellate Bench. It is difficult to suppose that if the Legislature had intended anything so precise as 'ex ship', it would have used the more general phrase 'at the place of importation'. The phrase "f.o.r. at the main ports of entry"—quoted from the appellants' price lists—comes within the meaning of the statutory phrase. This is the force given to the words 'at the place of importation' by Macleod C. J. and Shah J. in 47 Bom 174.[2] Before the Board the appellants' learned counsel did not contend for 'ex ship' but suggested that 'ex wharf' might not be too narrow and that in any case 'place of importation' would not extend beyond the limits of the port. That the cartage charges should be analysed so as to eliminate the proportionate cost of the journey from the boundary of the port to the railway station in Bombay, is not in their Lordships' view necessitated by the phrase 'place of importation,' still less could they regard it as a reasonable ground for holding that the sales in the present case were not within the terms of Cl. (a). That the Legislature intended to exclude post-importation expenses need not be doubted, but it had to do this in a practicable manner without undue refinement, and it must be taken to have regarded the phrase which it employed as sufficient for the purpose if taken in a reasonable sense.

The fact that the motor cars were incompletely assembled at the time of their arrival in Bombay gives rise to no difficulty; because, although the car, according to the price lists, had to be in running

2. Vacuum Oil Co. v. Secretary of State, (1922) 9 A I R Bom 12=67 I C 267=47 Bom 174=24 Bom L R 198.

order, the allowance in respect of this defect was an agreed allowance, and reduced the sum payable by the distributor to a price referable to the car in the condition in which it arrived in Bombay. The allowance was deducted by the customs authorities from the price to the distributors before arriving at the price upon which duty was calculated. The trial Judge thought it necessary to set on foot calculations as to the appellants' overhead expenses in respect of assembling, but in their Lordships' view this has no bearing upon any matter arising under Cl. (a) of S. 30 and the Division Bench rightly set aside this direction.

The price upon which customs duty has been charged appears therefore to be a wholesale cash price, less trade discount, for which the goods under assessment were in fact sold at the time and place of importation. On this footing their Lordships must now consider the more general arguments for the appellants against the application of Cl. (a) to the shipment in question. "Goods of the like kind and quality" is a phrase which suggests other goods than those under assessment. Upon this is based the argument that one must either disregard the price fetched by the goods themselves or should look to it only to see what price other similar goods would have realized. Unless that is ascertainable, it is contended, that the conditions of Cl. (a) are not satisfied. If, for example, one may assume that there were in Bombay no Ford Model A vehicles left undisposed of from previous shipments, then on this view the correct test is to ask oneself whether, apart from and in addition to those which arrived by the S.S. "ALGIC", further cars could have been sold in Bombay on or about 9th January 1929, and, if so, would they have fetched the same prices? If this be the true interpretation of the statutory test, there is difficulty in holding it applicable to the present case, and colour is certainly lent to the contention that Cl. (a) is intended only to have effect in the case of goods for which there is at the place of importation a market in the strict sense applicable only to staple commodities. But, in their Lordships' view, this is a misinterpretation of Cl. (a). The application of the clause does not depend upon any hypothesis to the effect that at the time and place of importation an indefinite amount of further goods added to the available supply has had effect upon the wholesale price. Ordinarily at the time of making out the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of Cl. (a). As a rule, therefore, the price appropriate to the goods under assessment will under the clause be deduced, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a "wholesale cash price less trade discount", the clause is not inapplicable for want of sales of other goods. The clause can be applied distributively to each of the motor cars in this consignment and even if they are regarded collectively the clause is not defeated. A particular car may be sold at a price which, having regard to other transactions in such cars or to other circumstances, is too high or too low. In that sense the actual price in a particular instance does not necessarily or finally establish a wholesale price to satisfy Cl. (a) whether the particular car or cars sold be part of the shipment in question or not. But the goods under assessment may under Cl. (a) be considered as members of their own class even although at the time and place of importation there are no other members. The price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation.

In the present case a number of sales have been made to different distributors in the ordinary course of an extensive importing business. It is difficult to think that the appellants' practice to find out their distributors' requirements in advance, and to place monthly orders with the manufacturers accordingly, would result in a perfect saturation of their "market"; but if it did, Cl. (a) of S. 30 does not require the customs duty to be calculated upon any supposition that would involve oversupply or any additional supplies. Without assuming that for Ford cars there was any perfect "market" in Bombay at the time in question, it is quite reasonable to ask what such cars were fetching wholesale at that time and place, and quite reasonable to answer it by taking the prices fetched by the cars under assessment. That the wholesale price obtainable was higher than it would otherwise have been, by reason of the appellants' organisation and business methods is not a ground of

exemption under Cl. (a), though doubtless their methods of business have improved the demand. That it was higher than it would have been, had not the appellants as monopolists carefully controlled the supply, may be equally true, but this again affords no escape from the clause if the case be otherwise within it. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Sanderson Lee & Co.

Solicitors for Respondent —
Solicitor, India Office.

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(*From Patna*: *A. I. R. 1936 Pat. 372*)

19th November 1937

LORD ALNESS, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Secretary of State — Appellant.

v.

Kuchwar Lime and Stone Co. Ltd. — Respondents.

Privy Council Appeal No. 24 of 1937, Patna Appeal No. 12 of 1936.

Lease—Forfeiture—Lease of quarry lands to company subject to covenant providing for forfeiture in case of subletting or transferring any interest in leasehold property—Contract of sale by lessee subject to sanction of Board of Revenue — Pending sanction, intending purchaser to act as agent of company and entitled to work quarries for his own benefit — Contract, though creating interest of value more than Rs. 100, not registered — Transaction held not subletting but held amounted to transfer of interest [*Reversing A I R 1936 Pat 372 pt.* (*d*)] which being ineffective for want of registration did not effect forfeiture.

Leases of quarry lands were granted to a company subject to the covenant providing that neither the lessee nor any person claiming through it should assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises without the assent of the Board of Revenue and that the penalty for infraction of this condition should be the forfeiture of the lease. The company contracted with a person for the sale of the lease-hold rights to him but subject to the sanction of the Board of Revenue. It was also provided that in the meantime the intended vendee should act as the agent for the company in respect of the lease-hold rights in the quarries, that he should pay to the company the royalties and other sums payable by it to the Government and that he should be entitled to work the quarries for his own benefit. The contract, though the value of the interest created by it was more than Rs. 100, was not registered:

Held that the transaction created an agency coupled with an interest and did not amount to subletting. The transaction however amounted to a transfer of an interest in the lease-hold property : *A I R 1936 Pat 372 pt* (*d*) *reversed*. But the contract not being registered, the transfer was not effective and hence there was no forfeiture of the lease. [P 22 C 1]

Fergus D. Morton and W. Wallach — *for Appellant.*

L. P. E. Pugh, T. F. R. McDonnell and B. Basu — *for Respondents.*

Sir George Lowndes. — The principal question in this appeal is whether two quarrying leases granted by the appellant to the respondents have been forfeited by reason of the breach of a covenant contained in each against assignment. The quarry lands were situated in the Shahabad District of the then Province of Bihar and Orissa; the leases were dated 1st April 1928, and were for terms of 20 years. The covenant against assignment was in similar terms in each, and provided that neither the lessee (the respondent company) nor any person claiming through or under it should assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises comprised in such lease without the assent of the Board of Revenue of Bihar and Orissa first being obtained, and that the penalty for infraction of this condition should be the forfeiture of the lease. In January 1933, the respondent company went into liquidation, and on 30th September of that year the company, through its liquidators, contracted with one Subodh Gopal Bose for the sale to him of the lease-hold rights under both leases for the sum of Rs. 6,000, but subject to the sanction of the Board of Revenue : the agreement to stand cancelled if such sanction was not obtained. It was also provided that in the meantime Bose should act as the agent for the respondents in respect of the lease-hold rights in the quarries; that he should pay to the company the royalties and any other sums payable by it to the Government; and that he should be entitled to work the quarries for his own profit. The contract was in writing but was not registered. Cls. 4, 6, 7, 8 and 9 upon which the question stated above mainly depends were as follows :

4. It is stipulated in the leases in respect of the lands set out in the schedule that the lessees shall not assign the leases or transfer any right or interest thereunder without the assent of the Board

of Revenue first obtained. The vendors shall apply for such assent, but shall not in any way be responsible and this agreement for transfer of the vendors' lease-hold right to the lands set out in the schedule hereto shall stand cancelled if such assent be not given by the said Board of Revenue.

6. The purchaser shall be appointed local agent of the vendors in respect of the leasehold right of the vendors to the lands set out in the schedule hereto and continue to act as such until the transfer of the lease-hold right be effected or until it is finally decided that such transfer cannot be made on and after the purchaser's furnishing guarantee to the vendors of regular payment of all royalties and other dues on despatches from the Murli Centre or otherwise in respect of the lands set out in the schedule hereto and on and after his depositing with the Liquidators a sum of Rs. 4,000 (Rupees four thousand) in cash by way of security for such payment, such deposit bearing interest at the rate of five per cent. per annum from the date of deposit till the transfer of the said leasehold rights or final decision that the leases should not be transferred.

7. Subject to the purchaser's furnishing guarantee and depositing the said sum of Rs. 4,000 (Rupees four thousand) as aforesaid, the purchaser shall be at liberty to quarry, burn, manufacture and sell lime and stone from the said lands on his own account without being liable to the vendors for any of the profit or loss thereof.

8. During the term of his local agency the purchaser shall — (a) submit to the vendors plans and details of working and monthly statement of account relating to quarrying, despatching and selling lime and stone from the said lands and regularly pay to the vendors the royalties and other dues if any payable to Government; (b) bear and pay all expenses of working the quarries, manufacturing, despatching and selling lime and stone and of otherwise using the said lands and shall perform and observe the covenants and conditions contained in the said leases under which the said lands are held; (c) indemnify the vendors against any loss or damage which the vendors may sustain by reason of the purchaser's working the quarries or burning, manufacturing, despatching and selling lime and stone from the said lands or Murli Centre.

9. If the purchaser do not take any appointment as local agent of the vendors as provided in Cl. 6 aforesaid, he shall not do any work in the quarries of the lands set out in the schedule or burn or manufacture lime thereon nor despatch lime and stone from the said Murli Centre until the transfer of the said leases has been accomplished.

Bose entered into possession of and worked the quarries upon the terms of this agreement, but the Board of Revenue refused their assent to the sale, and on 18th July 1934 they declared the leases to be forfeited on the ground that the respondent company had transferred or sublet the rights and interests under the lease to Bose in breach of the covenants above referred to. On 24th September, the respondent company instituted the suit out of which the appeal arises, in the Court of the Subordinate Judge of Shahabad claiming a declaration that the leases had not been validly forfeited, an injunction and Rs. 11,000 damages. A written statement of defence was put in by the appellant justifying the forfeiture, and the case went to trial before the Subordinate Judge upon the following two issues only :

(1). Whether the plaintiff has under the terms of the indenture dated 1st April 1928 forfeited the lease by reason of the transaction between the plaintiff and Subodh Gopal Bose under the indenture dated 30th September 1933. (2). Is the plaintiff entitled to any damage? If so, what amount?

The Subordinate Judge delivered his judgment on 7th March 1935. He held that the agreement of 30th September 1933, though purporting to appoint Bose to work the quarries as agent of the respondent company, was in substance and reality a sub-lease to him of the quarrying rights, and being without the consent of the Board of Revenue, was in breach of the covenants contained in the leases, and that they had therefore been duly forfeited. He accordingly passed a decree dismissing the suit with costs. The respondent company appealed to the High Court at Patna. The appeal was heard by Khwaja Mohammad Noor and Varma JJ. who delivered their judgment on 7th February 1936. On the question of forfeiture the learned Judges disagreed with the Subordinate Judge, holding that the agreement with Bose did not amount to either a sub-lease or a transfer within the covenants in question. They were also of opinion that if the agreement could be so construed, it would be void for want of registration. They accordingly allowed the appeal and granted the respondent company the declaration and injunction which it claimed. They also dealt with the question of damages to which their Lordships will revert later on in this judgment. From this decision the Secretary of State appeals to His Majesty in Council seeking to reinstate the decree of the Subordinate Judge for the dismissal of the suit. Before the Board a preliminary point was taken by the appellant that the suit was not maintainable on the ground that the respondent company was out of possession at the date of filing their plaint. This question had not been raised in the trial Court and the High Court held that the question, depending as it obviously did upon facts for which evidence would be

necessary, was not open before them. On this their Lordships are in full agreement with the High Court and have not deemed it necessary to hear the respondents' counsel with respect to it.

The main contention for the appellants has been that the agreement was in reality a sub-lease to Bose. The High Court coming to the contrary conclusion had relied on the judgment of Lord Russell C. J. in (1898) 2 Q B 259,[1] and their Lordships think that the passage cited by the learned Judges is directly in point. There is, in their opinion, nothing in the agreement which points to a relation of landlord and tenant between the parties. Bose was to be appointed the local agent of the respondent company and his right to work the quarries was dependent on his accepting this position. The Subordinate Judge thought the agency was a mere cloak to disguise a subtenancy, but their Lordships do not think that it should be so regarded. There may have been many ways in which Bose could have served the company as their agent, e.g. in respect of the care of buildings, plant, material, etc. No doubt he was not to be their agent in working the stone and manufacturing the lime and selling it, all of which was to be done on his own account and at his own risk. But it is not unusual to have an agency coupled with an interest and their Lordships think that this was the real effect of the agreement in the present case. There is however nothing in the document to suggest that the interest which Bose took was that of a sub-lessee. For these reasons their Lordships agree with the learned Judges of the High Court that there was no subletting by the respondent company.

Their Lordships are however unable to agree with the High Court in their view that "the transaction does not amount to a transfer of any interest in the lease-hold property". They think it clear that pending the completion of the proposed sale, the agreement purported to invest Bose with a definite interest in the quarries. He was entitled under it to dig the stone, convert it and sell the resultant product on his own account and this, in their Lordships' opinion, if it was an effective transfer, would be a breach of the covenants in the leases to the company and would entitle the appellant to forfeit them. The only question their Lordships think is whether it was an effective transfer. The judgment of the High Court continues, after the sentence quoted above,

> assuming that it does, it is inoperative for want of registration of the document. Being an interest created in an immovable property of more than Rs. 100, the document was compulsorily registrable under S. 17, Registration Act, and not having been registered has not affected the property under S. 49 of that Act.

Reading this sentence as meaning that the interest transferred was of the value of more than Rs. 100, as their Lordships think they must do, and assuming it to be correct, counsel for the appellant does not dispute the accuracy of the dictum, nor does he contend that if it was merely an attempted but wholly ineffective transfer, there would be a breach of the covenants. His only answer is that there is no proof that the interest was, in fact, of the value of more than Rs. 100, and if not, registration would be unnecessary and the transfer would be effective. Their Lordships do not think that it is open now to the appellant to raise this objection. There was no contention before the Subordinate Judge as to registration or as to the value of the interest transferred. But it would clearly have been open to the appellant to take the point before the High Court if the value had really been in doubt. The High Court seem to have assumed that the value was over Rs. 100, but no protest or objection was made on the Secretary of State's behalf either to the Court or in the application for leave to appeal from their judgment. Nor indeed is the point raised in the appellant's printed case before the Board. If there had been any substance in the objection, the value could obviously have been determined either by the High Court or by a reference back to the Subordinate Judge. But their Lordships have little doubt that it cannot have been seriously disputed in India that the value of the concession was worth more than Rs. 100. The appellant's contention is obviously one dependent upon proof of facts, and not merely a question of law, and their Lordships must hold therefore that it is not now open to him.

It only remains to deal with the question of damages. As already stated, the respondent company by their plaint claimed Rs. 11,000 damages and at the trial an issue was raised as to this in the ordinary form. In the judgment of the Subordi-

1. Horsey Estate Ltd. v. Steiger & Petrifite Co., (1898) 2 Q B 259=67 L J Q B 747.

nate Judge the issue is dealt with in the following words :

In view of my findings on issue 1, the plaintiff is not entitled to any damage or to any other relief in the suit. In fact no evidence on the question of damage was adduced on behalf of the plaintiff.

The High Court nevertheless affirmed the respondent company's right to damages and ordered the amount to be ascertained by further proceedings in the lower Court; the judgment contains the following passage :

The next question urged by the learned Government Pleader was that the plaintiff was not entitled to any damages for interference with the leases as it had abandoned the claim for them. I do not find any abandonment. In fact an issue about the damages was raised; but no evidence was given as parties very rightly wanted the determination of the main issue. When dealing with the question of damages, the learned Subordinate Judge has stated that the plaintiff adduced no evidence. The remark is not justified. Both parties seem to have agreed that no oral evidence should be adduced and the case should be decided on the pleadings and documents.

Their Lordships can find no justification for this conclusion or for the learned Judges' criticizm of the Subordinate Judge. The order sheet of the proceedings in the trial Court is on the record of the appeal and it contains nothing to suggest that the trial of the issue as to damages was postponed, or that there was any agreement between the parties to that effect. Nor can counsel for the respondent company throw any further light on the matter. In their Lordships' opinion, the proper inference is that the claim for damages was abandoned, and they think that the decision of the High Court on this point was erroneous. For the reasons given above, their Lordships think that the decree of the High Court dated 7th February 1936 should be affirmed only in so far as it granted the respondent company the declaration and injunction prayed in the plaint and that the claim for damages should be disallowed. In their Lordships' opinion the respondent company was entitled to its costs against the appellant in the first Court and to half its costs in the appeal to the High Court, and the appellant to half his costs before the Board against the respondent company : they will be set off in the usual way. Their Lordships will humbly advise His Majesty to this effect.

D.S./R.K. *Decree modified.*

Solicitors for Appellant —

Solicitor, India Office.

Solicitors for Respondents —

Sanderson Lee & Co.

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(*From Canada*)

29th October 1937

LORDS ATKIN, MACMILLAN, WRIGHT AND MAUGHAM.

Isaac W. C. Solloway and another — Appellants.

v.

J. P. McLaughlin — Respondent.

Privy Council Appeal No. 69 of 1936.

(a) Contract—Stock exchange transactions —Stockbroker though may not retain for his client specific shares purchased must retain equivalent number of shares.

A stockbroker is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. But he has, of course, to get into his possession and retain an equivalent number of shares. [P 24 C 2]

(b) Principal and Agent—Agents who defraud their principal are not entitled to indemnity — Agent fraudulently disposing security deposited by principal—Disposal of security amounts to conversion entitling principal to damages—Principal not knowing of conversion receiving the very goods converted or equivalent—Effect.

Agents, who engage in a fraudulent scheme to defraud their principal, forfeit their right to an indemnity in respect of transactions which form part of the fraud. Where an agent fraudulently disposes security deposited with him by the principal, his disposal of the security amounts to nothing short of conversion and the principal has vested in him a right to damages for conversion which would be measured by the value of the security at the date of conversion. If, not knowing of the conversion the principal has received from the wrongdoer and has retained the very goods converted or their equivalent, the only effect is that the principal must give credit for the value of what he has received at the time he received it, and the damages are reduced by this amount: (*1864*) *17 C B (N S) 280, Ref.* [P 25 C 1, 2]

Fortunately for the commercial community the law has many effective forms of relief against dishonest agents: and no injustice is done if the principal benefits as he occasionally may by the superior astuteness of an unjust steward in carrying out a fraud. [P 26 C 1]

Cyril Radcliffe, Wilfrid Barton and R. I. Ferguson (of the Canadian Bar) — *for Appellants.*

J. C. McRuer and F. A. Brewin — *for Respondent.*

Lord Atkin.—These are an appeal and a cross appeal from decisions of the Supreme Court of Canada in an action brought in the High Court of Ontario by the present respondent against two companies named Solloway Mills and Co. Ltd., one registered in Ontario and the other in the

Dominion and against the present appellants Mr. Isaac Solloway and Mr. Harvey Mills, two of the directors of the companies. The action was tried before an Assistant Master, Mr. Lennox, who reported that there was due to the plaintiff from the Ontario Company and the appellants the sum of $65,129.92. The Dominion Company had dropped out of the proceedings. On appeal by the present appellants from the Master's report, Kerwin J. confirmed the report with an arithmetical correction of the amount found to be due to $55,922.98. On appeal the Court of Appeal dismissed the action as against the present appellants, Macdonnell J. A. dissenting. On appeal by the plaintiff, the Supreme Court allowed the appeal but reduced the amount of the judgment to $28,281.40 and interest. The two director-defendants appeal and the plaintiff cross appeals.

The claim of the plaintiff arose out of transactions which he had with the Ontario Company in 1929 and 1930. The Company purported to carry on business as stockbrokers having acquired in 1928 the business of that nature which had been started by the two appellants in 1927. The Company were members of the Standard Stock and Mining Exchange in Toronto. On 16th October 1929 the plaintiff instructed the Company to buy for him 7,000 shares of Sudbury Basin Mines Ltd. on margin at market price, then $7 a share. He at the same time deposited 3,500 shares of Sudbury Basin Mines, Ltd. as margin. He duly received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate Stock Exchange which in the present case was the Standard Stock and Mining Exchange in Toronto. The shares steadily declined in value : requests were made from time to time by the Company for further margin or cash: the plaintiff duly complied with these requests so that in the course of the transactions between October and December inclusive he deposited with the Company a further 10,500 shares of the Sudbury Company and paid $8,000 cash. He received monthly statements showing the shares as being carried for him. On 13th January 1930 the plaintiff decided to close the account. The balance against him on that date appeared to be $42,334.92. He paid that sum and was given delivery of 21,000 shares, i. e. 7,000 originally bought, 3,500 originally deposited and 10,500 subsequently deposited. It now appears that the transactions as far as the Company were concerned were part of a fraudulent system of business and were themselves fraudulent in their inception, continuance and completion. The Company purporting to buy and in fact making valid contracts of purchase for their clients contemporaneously sold shares of the same Company, and used their client's shares to complete these sales. The shares are in the form familiar in American companies and with a blank transfer endorsed pass in a similar manner to bearer shares. A broker is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. But he has, of course, to get into his possession and retain an equivalent number of shares. Under the fraudulent system of the Company, they were throughout the course of this transaction 'short' of these Sudbury Basin shares by about 100,000 shares, involving no doubt similar frauds on other clients. In other words they were bears when their clients were bulls: they correctly anticipated the fall of the market: and when their clients demanded the shares they went into the market and bought them at the fallen price to their own substantial profit. The same course was adopted with the shares deposited as margin. The Company sold them as soon as they were deposited, without any lawful excuse, even if the transaction had been in every other respect regular: when they were claimed by the plaintiff, an equivalent number was bought in the market and delivered to the plaintiff with further profit to the Company. It was disputed that the two appellants were parties to the fraud. Their Lordships agree with the Assistant Master, Kerwin J. and Macdonnell J. A. and the learned Judges of the Supreme Court that it was established that both the appellants were privy to and took part in the fraud throughout. They find it unnecessary for them to discuss this contention.

What then are the rights of the plaintiff in this state of facts? The Assistant Master gave him the full amount at which he had been charged for the 7,000 shares bought, and also the price at which the Company had realised the deposited shares, crediting the defendants with the market value of the shares at the time when they were delivered to the plaintiff. The Supreme Court agreed with the claim so far as it

related to the 7,000 shares: but as to the deposited shares they took the view that the plaintiff had made his claim in respect of them for secret profits: that he had affirmed the transaction by taking and keeping the shares delivered to him when the account was closed: and that as he had claimed in contract or quasi-contract against the Company, he could not claim against the directors unless he had shown against them some perception of the profits: and this he had failed to establish. They therefore reduced the amount of the judgment to the amount charged to the plaintiff for the 7,000 shares less their value when delivered.

Regarded from this point of view, their Lordships have no criticism to pass on the judgment. But the plaintiff before the Board put his claim on a broader basis which is sufficiently revealed by the pleadings and which their Lordships are disposed to accept. The Company were employed as agents. If they had honestly fulfilled their mandate, they would have been entitled not to the price of the 7,000 shares but to an indemnity against the price which they had paid to the sellers. But agents who engage in a fraudulent scheme to defraud their principal, forfeit their right to an indemnity in respect of transactions which form part of the fraud. The Company therefore were never entitled to an indemnity: and the principal on discovering the fraud was entitled to recover back the money paid on the footing of an honest transaction, giving credit, of course, for any benefit which he received, in this case the value of the 7,000 shares at the time he received them. As to the deposited shares in the circumstances of the case the Company never had any right to deal with them. If the transaction had been originally honest, the Company would only have had a special property which on the facts of the case, even had the transaction been honest throughout, would not have given them the right to dispose of the shares, for there never had been default. But on the actual facts of a mandate accepted for the express purpose of being fraudulently misused by the agent, the agents never had the right to claim or to hold security, still less to dispose of it. Their disposal of the deposited shares amounted to nothing short of conversion: and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion. How then is his position affected by the fact that not knowing of the conversion he received from the wrongdoer and has retained the very goods converted or their equivalent? It appears to their Lordships that the only effect is that he must give credit for the value of what he has received at the time he received it, and that the damages are reduced by this amount. In (1864) 17 C B (N S) 280,[1] the plaintiff had placed his looms with the defendant who was to supply standing room and power in his mill. The plaintiff demanded the return of his looms, the defendant refused (thereby being guilty of conversion), and the next day the goods were seized and subsequently sold under an execution from the County Court on a judgment obtained by the defendant against the plaintiff. The question was whether the fact that the liability of the plaintiff on this judgment had been apparently satisfied by the seizure and sale of the looms could be taken into account in estimating damages for the conversion. The Court of Common Pleas, Vaugham Williams, Willes and Byles JJ. decided against the defendant:

> "The measure of damages for the conversion of goods" said Willes J. at p. 294, "is prima facie their value . . . ". "Then there is the case in which the goods wrongfully seized have been afterwards returned. The cases in (1841) 8 M & W 540[2] and (1843) 11 M & W 740[3] afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored and the plaintiff has consented to take them back in discharge of the claim, that might be pleaded by way of accord and satisfaction: if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion".

It does not require argument to show that the amount by which the damages are reduced must be the value of the goods when returned. In the result therefore the plaintiff appears to be entitled to retain the sum for which he recovered judgment under the order of Kerwin J. It is objected that this will be to put him in a better position than if he had not been defrauded at all: and this appears to have influenced

1. Edmondson v. Nuttall, (1864) 17 C B (N S) 280 =34 L J C P 102=13 W R 53.
2. Fouldes v. Willoughby, (1841) 8 M & W 540 =1 D (N S) 86=10 L J Ex 364=5 Jur 534= 58 R R 803.
3. Harvey v. Pocock, (1843) 11 M & W 740=12 L J Ex 434=63 R R 741.

the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognize that fraudulent brokers have often sounder judgment than their clients as to the future course of markets. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion, though he himself had planned and thought he had succeeded in holding the shares until a time when the value was nothing: fortunately for the commercial community, the law has many effective forms of relief against dishonest agents: and no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud.

In the course of the case a point has been made that the Assistant Master under the Acts and Rules of Procedure in Ontario had no jurisdiction to entertain this case. It has not met favour in any of the Courts below. In the Supreme Court, though it is mentioned in the factums, it was either not argued or met with little approval, for it is not mentioned in the judgment. Their Lordships see no reason for interfering with the judgment on this ground. The appeal will be dismissed and the cross appeal allowed: the judgment of Kerwin J. dated 13th June 1933 should be restored: and the respondent should have the costs of the appeal to the Court of Appeal in Ontario and to the Supreme Court. The appellants must pay the costs of the appeal and cross appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal dismissed*; *Cross appeal allowed.*

Solicitors for Appellants — *Gard Lyell & Co.*

Solicitors for Respondent — *Lawrence Jones & Co.*

*** A. I. R. 1938 Privy Council 26**

(*From Cyprus*)

16th November 1937

LORD THANKERTON, LORD WRIGHT AND SIR GEORGE RANKIN.

Ottoman Bank of Nicosia—Appellants.

v.

Ohanes Chakarian — Respondent.

Privy Council Appeal No. 56 of 1936.

*** (a) Master and Servant—Unit of account must be applied to appropriate currency then prevailing — Contract to pay *X* pounds as salary while currency in gold — Gold currency ceasing to exist — Employee cannot claim salary on gold basis.**

Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency. Hence, unit of account must accordingly be applied to the appropriate currency which may vary from time to time. [P 29 C 1]

Where by the contract of employment, the salary of an employee is fixed at *X* pounds when the currency is in gold, he cannot claim his salary on the gold basis when the gold currency has ceased to exist and some other form of currency takes its place: (*1934*) *A C 122 and A I R 1937 P C 54, Rel. on*; *A I R 1930 P C 110, Approved*; *A I R 1935 P C 39, Expl. and Disting.* [P 29 C 1]

(b) Contract – Alteration of—Contract clear and unambiguous — True effect cannot be altered merely by course of conduct.

If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. [P 29 C 2]

(c) Contract—Currency — Currency in particular country must be determined by the law of that country.

The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. [P 32 C 2]

D. N. Pritt, Cyril Radcliffe, Colin Pearson and I. W. G. Barry — *for Appellants.*

Sir William Jowitt and Kenelm Preedy — *for Respondent.*

Lord Wright. — The question in this appeal is the amount of pension to which the respondent is entitled on his retirement from the service of the appellants. His claim is that he is entitled to be paid his pension in Turkish gold pounds, by which is meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange. He succeeded in the Courts below, though there were considerable differences of judicial opinion. In the first Court which was the District Court, two Judges were in his

favour while the third dissented. In the Supreme Court of Cyprus, there was again a division of opinion, Strong C. J. delivered a judgment in favour of the appellants, while Thomas J. was of the opposite opinion. The Court being equally divided, the judgment of the lower Court stood.

The appellants, now called the Ottoman Bank, previously called the Imperial Ottoman Bank, were established in 1863 by a Turkish Imperial Firman. The head office is at Istanbul, where its affairs are, and have been, administered by a Direction Generale subject to instructions given by a committee which meets both in London and Paris. The appellants have a great many branches. These were before the war mainly in various places in the Ottoman Empire. Many of these branches are now, since the war, in countries which no longer form part of that Empire. But it also had branches before the war in Greece, Cyprus, Syria and other countries. The respondent entered the service of the appellants in October 1910, as a probationer at Nazli in Turkey, and was placed on the permanent staff in October 1912. There was no written contract of employment, but he signed a declaration that he had taken knowledge of the regulations governing the pension and superannuation fund adopted by the Direction Generale and that he would adhere strictly to those regulations as forming an integral part of the conditions of his engagement. It is clear and is common ground that the contract of employment was governed by Turkish law and that his salary (what is described as his basic salary or his *traitement fixe*) was in Turkish pounds. He served in different parts of Turkey continuously (except for certain periods in 1916, 1917 and 1918, when he was absent on military service) until about October 1922. He was then for reasons connected with the war compelled to leave Smyrna and go to Athens. About the end of April 1923, he was transferred from Athens to Cyprus where he remained in the appellants' service until 1931 when he retired on the terms that he was entitled to a pension in accordance with the pension regulations at the rate of 48 per cent. of the fixed salary received by him on 31st December 1930. His basic salary as expressed in Turkish money was Ltq. 30 a month and his pension was accordingly Ltq.14.40 per month. The question in the appeal is how that monthly pension is payable. As already stated, the respondent's contention is that he is entitled to be paid a fluctuating sum of money in currency sufficient to purchase the quantity of gold bullion which would have been represented by these Turkish pounds on a gold basis. The pension regulations provide for the right of the employees to a pension on retirement subject to various conditions not here material, and the appellants bind themselves to maintain a pension fund to be fed from time to time by contributions from the employees of 4 per cent. of their fixed salary, together with half of any increments they receive in any year and by monthly contributions from the appellants of 6 per cent. of the salaries. In 1925, during the course of the respondent's service, the 4 per cent. was increased to 5 per cent. and the appellants' contribution was increased to 10 per cent. The articles of the regulations which are essentially material in this case are the following :

"*Article 14* which provides that the amount of the pension is fixed on the basis of the salary which the employee received on 31st December of the year preceding that in which he is retired.

Article 15 —The amount of the pension will be calculated on the following basis : (1) For 10 years' service 30 per cent. of the annual fixed salary. (2) 2 per cent. for each of the subsequent years.

Article 16.—In no case shall the amount of the pension exceed the three-quarters of the annual fixed salary. Nevertheless, neither can the pension be less than Ltq. 45 per annum for an employee, nor than Ltq. 25 per annum for a servant."

This last article shows that the basic salary on which the pension is based is to be expressed in Ltqs. and this is corroborated by Art. 22 which deals with widows' and orphans' pensions, and which states that any such pension cannot be less than Ltq. 25 per annum or more than Ltq. 300 per annum.

It is not suggested that there are to be found anywhere any contractual conditions which could be described as "a gold clause". The respondent's claim is based on the fact that before the war the currency authorized as legal tender by the Turkish Government was on a gold basis and the monetary unit was the gold pound, and that at the date of the contract the salary was paid to the respondent and other employees by means of that currency in gold coins,

save as to fractional amounts. Assuming these facts, the conclusion is sought to be deduced that after the war and after, Turkey, like other countries, went off gold, still there was an original contractual obligation to pay in gold which existed throughout. In other words, this contention amounts to introducing into the contract the effect of a gold clause, a clause the nature of which has been discussed in several cases, though in fact no such clause is anywhere expressly to be found in the transactions between the parties. The respondent also sought to corroborate this conclusion by referring to the practice adopted by the Bank in paying the salaries of its employees in Turkey, in Cyprus and in other countries after the currency changes which were consequent on the war had taken place. The respondent contended that what was done in that way showed an intention throughout to pay the equivalent of gold coin. The appellants, on the contrary, relied on these same circumstances as showing that neither in fact nor in intention was the respondent ever paid on the basis of the gold content of Turkish pound, or on a gold parity.

Before examining in outline the nature of the different evidence, it will be necessary to advert briefly to the evidence of the Turkish currency law. As has already been stated, before the war the Turkish currency was on a gold basis and the gold £1 coins were in circulation as legal tender. In January 1915, the export of gold was prohibited and a series of Acts were passed in Turkey providing for a paper currency which should have a compulsory circulation as legal tender alongside of and as equivalent to gold, that is to say, the currency note for the Turkish £1 should be legal tender compulsorily alongside of and in place of the Turkish monetary unit which, in a decree of 1880 had been specified to be the gold £ of 100 piastres. These various enactments, each of which provided for the issue of a certain quantity of paper currency notes, were expressed to be temporarily in operation and provided for the redemption of those paper notes in gold after the war. That has never been done. In 1925 the existing notes then in circulation were replaced by a single issue of notes by the Government. At all material times since the commencement of the war, the paper notes have been legal tender and, although the gold £ is still legal tender, the paper currency has in accordance with Gresham's Law driven out from circulation the gold currency, so that in practice gold has ceased to circulate as legal tender. The Turkish gold coins are now, for all practical purposes, only dealt with as a commodity or bullion. This was very fully explained by the evidence of the experts on Turkish law and on the conditions of Turkish currency called by the appellants. The appellants also called a Turkish lawyer who stated in evidence that by Turkish law a contract made, say, in 1912, subject to Turkish law, to employ a man at Ltq. 20 a month would not be construed by that law as a contract to pay him 20 pieces of gold, even though gold was the normal form of the then legal tender, but as a contract to pay him Ltq. 20 in whatever might be legal tender in Turkey according to Turkish law at the material time. There was, said this witness, nothing before the war in Turkish law to say that Ltq. 4 salary was a contract meaning Ltq. 4 gold.

This evidence of the eminent Turkish lawyer was not shaken or contradicted and no good ground can be adduced for not accepting it. It is in fact in accordance with the English law on this point, which is now well established, particularly by some recent decisions. In (1934) A C 122[1] a question arose as to the appropriate currency in which a certain debt should be discharged. The question there was not identical in form with the question here to be decided, but the House of Lords laid down certain principles which are of general application and are to be applied to the questions in this case. In particular, reference may be made to a statement by Lord Russell of Killowen at p. 148 where he expresses the difference between what is called a unit of account and the legal tender which corresponds to the unit of account. In the *Adelaide case*[1] the question was what was the currency in which the debt was payable, whether English or Australian. Lord Russell said :

> The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in

1. Adelaide Electric Supply Co. v. Prudential Assurance Co., (1934) A C 122=103 L J Ch 85=150 L T 281=39 Com Cas 119=77 S J 913=50 T L R 147.

terms of currency, but in terms of units of account.

The same view was expressed by this Board in a similar case—(1937) A C 587[2] at p. 605, where it is stated :

> Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency.

The unit of account must accordingly be applied to the appropriate currency which may vary from time to time. In the *Adelaide case*[1] Lord Wright in his speech, p. 160, quoted as a correct statement of the law what was said by Maugham J. in (1933) 1 Ch 373[3] at p. 391 :

> A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is prima facie a contract to pay money according to the currency of the country where payment has to be made.

These words are equally true of a case like the present where the question does not turn on a conflict between the currency of one country and another, the unit of account being identical in both, but where there has been a change in the currency of the country concerned. That type of case was dealt with in (1923) 2 Ch 466[4], where a mortgage debt in German reichsmarks contracted while Germany was on gold, was held by Russell J. and by the Court of Appeal to be dischargeable in depreciated German reichsmarks without reference to what country was the place of payment. Lord Sterndale said at p. 478, "if their [i. e. the mortgagees'] rights are to be defined by German law, it must be that law as it exists from time to time." The effect of the respondent's contention, if acceded to, would be to construe a contract which did not contain a gold clause, exactly as if there were a gold clause expressed in it. The nature of a gold clause is now well established ; it has been fully discussed in the decision of the House of Lords in (1934) A C 161,[5] and more recently in (1937) A C 500,[6] where it is pointed out by the Court of Appeal that gold clauses in bonds and obligations are very common in international contracts in every part of the world and that the construction of such clauses has now been definitely settled. It would indeed be a paradoxical result if it were now to be held that the gold clause is unnecessary, because it is to be implied in every contract which was made at a time when the country was on gold and when payments were normally made on a gold basis. The gold clause was specifically designed to safeguard the rights of the creditors against the risk of the currency being changed and depreciated.

So far, this way of regarding the matter would appear to be conclusive against the respondent's contention and to dispose of the appeal in favour of the appellants. It is however necessary to examine with some care the practice of the appellants in paying their employees, and in particular the course which they adopted in Turkey in paying the respondent and other employees after the Turkish currency went off gold. Reliance is placed by the respondent on these facts as being, in a phrase which was used, exegetical of the contract and something like the principle of contemporaneous exposition was invoked. It is obvious that if the contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct if it is clear and unambiguous may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification. But the practice which is relied on here is not contemporaneous with the contract, and at the best is ambiguous, whereas the contract is clear. In addition the practice seems to be only consistent, when properly understood, with the construction of the contract which their Lordships have just enunciated. The change in the Turkish currency became effective early in 1915, but for some time did not appear to affect the actual relations of the parties in regard to the payment of salary, while the respondent continued to serve in Turkey which was until 1923, subject to his military service and the short period which

2. Auckland Corporation v. Alliance Assurance Co., A I R 1937 P C 54=(1937) A C 587 (PC).
3. Broken-Hill Proprietary Co. v. Latham, (1933) 1 Ch 373=102 L J Ch 163=148 L T 412=77 S J 29=49 T L R 137.
4. In re Chestermans Trusts; Mott v. Browning, (1923) 2 Ch 466 = 93 L J Ch 263 = 130 L T 109.
5. Feist v. Societe Intercommunale Belge de' Electricite, (1934) A C 161=103 L J Ch 41=150 L T 41=39 Com Cas 145=78 S J 64=50 T L R 143.
6. Rex v. International Trustee, (1937) A C 500.

he spent at Athens. It will be convenient first to deal with what was done in Turkey in the payment of salaries to employees, including the respondent, in that country. Up to about May 1916, the appellants, notwithstanding the change in the currency law, elected to pay the fixed salaries to their employees in Turkey in gold at its face value. From then, save for a few months in which half the salaries were paid in gold and the other half in currency notes, until December 1919, they paid the fixed salaries in currency notes at their face value, but they made certain additional payments for practical reasons. By the latter part of 1916 the currency had seriously depreciated and the cost of living had enormously increased and it was accordingly necessary for the appellants to take some remedial measures to help their employees in Turkey who, if paid in the depreciated currency the amount of their fixed salary and nothing more, would have been unable to live. The appellants were naturally anxious not to change the fixed salaries because they thought the unfortunate conditions would be temporary and they sought to meet the conditions by paying in addition to the fixed salary certain additional emoluments which were variously called allowances, indemnities or gratifications: the fixed salary however was treated as constant and the contributions to the pension fund continued to be based on the fixed salary. The amount of these additional allowances varied from time to time and varied between one class of employee and another. They had no definite relation to the disproportion between gold and currency, nor had they the effect of paying to the employees sums in currency equivalent to what has been called the gold value of the fixed salary. It is unnecessary here to detail the elaborate calculations which the appellants adduced in order to prove this fact.

At the beginning of 1920 it was sought by the appellants to put the whole position on a more constant basis and the scheme was adopted, at first only for one year, that the employees in Turkey should be paid on the following basis — the basic salary in the Turkish currency was multiplied by a coefficient 110.100 and the product obtained, regarded as a notional sum in pounds sterling, was reconverted into Turkish currency at the average of the rates of exchange which had prevailed in the market during the previous three months between the pound sterling and Turkish currency ; the sum in Turkish currency arrived at by these two arithmetical operations was with, in most cases, allowances, the sum paid to the employee. The rate of exchange for the previous three months was, in the first instance, taken as Ltq.3.63 to the £ sterling. This was an average rate and was further removed from accuracy by the time lag. That method was, after a few months, varied by substituting a conventional figure of 4.51 as a rate of exchange and after a while the system became established to multiply the fixed salary by a fixed coefficient of 4.1 as representing 451/110. This method was adopted with the same object of maintaining unaltered the fixed salary, but increasing the payment in order to meet the increased expense of living, and it was sought to establish that position on a constant basis so long as circumstances might require. It is impossible to treat such a method as giving to the employees in fact or in intention the equivalent of gold. There are many reasons apart from the obvious purpose of the scheme as already stated. It is clear, in the first place, that at no period between 1920 and 1923 was sterling on a gold basis. For instance in 1920 when the scheme was first introduced in its original form, England was off the gold standard and sterling had depreciated in terms of gold to an extent of 20 per cent. to 25 per cent. ; sterling did not again go on to gold until late in 1925. Further, the rate which was adopted and which eventually became standardised at 451 piastres to the £ sterling, was much lower than the current market rates which rose above 600 and eventually to a figure more than 800. Calculations have been adduced for the years 1921, 1922 and 1923 showing the disproportion between the actual salary payments made under this scheme as compared with what would have been the value in terms of fine gold of the fixed salary. Even if the additional allowances which were regularly made in addition to the payments on account of the fixed salary arrived at according to this system are taken into account, the total sums so paid to the employee are, in general, less, and sometimes much less, than what would have been the value of the gold content of the Turkish pound of fixed salary. It is enough here to state this conclusion without further discussing the detailed evidence.

The position so far is that no question of a change of practice arose until some years after the respondent's employment began, and because of the special conditions which supervened, and the practice which was adopted up to the time when the respondent went to Athens does not in fact support the view that he was being paid his salary according to its gold equivalent. During the few months in which he was in Athens he was paid in drachmas on a conventional rate of exchange. When he went to Cyprus it was on the terms of a letter from the general management dated 31st March 1923, in which he was instructed to proceed to serve in Cyprus at the same salary of Ltq.30 per month "which will be paid to you on the basis of the system customary in that island (*qui vous sera regle en base du regime usite dans cette ile*)". The respondent proceeded accordingly. The "*regime usite*" thus referred to was a practice which had long been adopted by the appellants in paying their employees in Cyprus ; the practice was analogous to that which they had adopted in paying employees in other countries, such as Greece or Egypt, in which there was a currency different from the Turkish. The amount of the fixed salary was converted into Cyprus currency at a fixed coefficient 110 to 100 : that practice, which prevailed before the war, was continued by the appellants after the war and notwithstanding the depreciation of the Turkish currency. It had the effect of making up to some extent the depreciation of the Turkish currency. It did not, however, put the payment of the Turkish salary when converted into Cyprus currency on a gold basis ; in the first place sterling itself, as has already been pointed out, was not equivalent to gold ; again the conventional coefficient 110 to 100 did not represent the true pre-war rate of exchange which varied between 109 and 111½, nor did it represent the true ratio between the two gold coins which was 110.69 to 100.

It is impossible, in their Lordships' judgment, to treat this method of paying salary as showing that the original contract was a contract to pay in gold coins. The ratio 110.100 had been adopted by the Bank for purposes of internal book-keeping and had been adopted even before the war in paying its employees in Cyprus as a convenient and sufficiently accurate method and as such was continued for the reasons which have been stated, but not with any intention or effect of paying on a gold basis. The respondent's contribution to the pension fund which in Turkey had been paid on the converted figure of the fixed salary when that system was adopted, was in Cyprus paid on the actual salary payments in Cyprus currency and was no more on a gold basis than the salary itself. The respondent further contended that while he was in Cyprus, and in particular on the date of 30th December 1930, which was the date to be taken under the regulations for ascertaining his basic salary, what he was receiving was the equivalent of gold because, he said, in Cyprus, during the years he was there the Cyprus currency notes which were equivalent to the sterling currency, were in fact interchangeable with gold. Indeed he said that occasionally he did actually get gold sovereigns from the Bank.

Their Lordships find that there is no justification for this view ; the evidence is quite clear that the sovereign in Cyprus, as in England, was not used as currency. The records of the Bank show very few instances, negligible in amount, of sovereigns being paid or received. Hence this point may be disregarded. The precise effect of the letter of instructions, coupled with the respondent's action taken on that letter, has not been precisely elucidated in argument. It is not contested by the appellants that in respect of the Cyprus service they are bound to pay, and they are certainly willing to pay, the respondent in regard to his pension on the salary as based on the terms of that letter. It may be that there was in law a new and revised arrangement fixing the salary payable to him while in Cyprus on that particular basis. That however would not give the respondent any right to claim that his salary was on a gold basis. His rights would be to receive the fixed salary in Turkish currency converted by the artificial system which was adopted. This is what the appellants concede, but it would not, on any view, carry with it a right to be paid such an amount of Cyprus currency as would represent the gold value of Ltq.14.40. Nor would any different result follow if the true view were that this arrangement was simply giving effect to the original bargain between the parties which, on this view, included the implied term that the *regime usite* was to apply if the respondent was ordered to go to Cyprus.

It would seem that so far as salary was concerned, the *regime usite* only came into operation so long as the respondent was actually serving in Cyprus. It is not here necessary to determine what would happen as regards the pension if the respondent, while enjoying the pension, ceased to reside in Cyprus. At present he appears to have a permanent position there. It may be that the true view is that his pension once having been ascertained in the way in which it has been ascertained, would remain unaltered even though he were to leave Cyprus.

Their Lordships have not thought it necessary to refer specifically to the entries in the salary book which seem to them to accord with the view of the position just stated. It is however necessary to refer to two further arguments which were put forward by Sir William Jowitt for the respondent. The first may be thus stated : "Taking the salary at the material date on which the pension is to be based at Ltq.30 and taking the conventional coefficient of 110 to 100 and bearing in mind that Cyprus was on gold parity at the material date, the true inference, it is contended, is that the Bank thereby designed to pay in Turkish gold, because the ratio had no meaning as applied to Turkish paper, in fact, at that time, the exchange of Turkish paper as against sterling was 900 or more." This argument, in their Lordships' judgment, entirely overlooks the whole history of the case and the method of evaluation according to which the actual payments were arrived at. In addition, it was, in the strict sense, merely accidental that the English £ was on gold in December, 1930. In the course of 1931, as is well-known, the £ went off gold and the sterling £ depreciated so that the sovereign was worth more than 30s. sterling. This again shows that the coefficient of conversion had no relation to gold.

A further point put forward by Sir William Jowitt was based upon the construction of the Turkish statute which authorised the issue of currency notes and made them legal tender. These statutes were in terms limited to Turkish currency in Turkey. Sir William has contended that outside Turkey, pre-war currency law remained in effect, so that the legal tender outside Turkey remained the Turkish gold pound. Their Lordships are unable to accept this contention. The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. There is no foundation in their Lordships' judgment for the argument that Turkish paper is only legal tender as equivalent to gold *sub modo*, that is, within the territorial limits of Turkish jurisdiction.

For these reasons their Lordships are of opinion that the appeal should be allowed. It is however necessary to refer to two recent judgments of this Board which appear to conflict with each other and one of which is in the result in conflict with the present decision. It will be convenient first to deal with the latter of these two cases, (1934) A C 354.[7] The Bank's employee, the plaintiff in that case, was serving in Cyprus when he became entitled to his pension in the latter part of 1932. It was held by this Board that he was entitled to succeed on his claim that the pension was payable in Turkish gold £ translated into Cyprus currency at the exchange rate of the day. The basis of their Lordships' decision was that the reference in the pension regulations to the Ltq. was a reference to Turkish gold £, on the ground, it seems, that the only Turkish gold £ in circulation was a gold coin of a special gold content. If this view of the true construction of the regulations could be regarded as a mere question of law, their Lordships might hesitate before differing from a previous decision of the Board, though in this particular case it has to be observed that the Board in that decision were, in truth, themselves differing from an earlier decision of the Board as will be explained later. But the construction of the pension regulations depends on Turkish law which in the Cyprus Court is a question of fact and the Board in (1934) A C 354[7] had no evidence before them on Turkish law. They did not have the evidence which the Courts had before them in this case and which their Lordships now have before them, that according

7. Ottoman Bank of Nicosia v. Dascalopoulos, A I R 1935 P C 39 = (1934) A C 354 = 103 L J P C 73=151 L T 151 (P C).

to Turkish law the pension regulations did not constitute a contract to pay in gold. This vital circumstance is enough to entitle and indeed compel their Lordships now to consider the case before them independently of (1934) A C 354.[7]

There are several other matters which also impose this duty upon the Board, for instance the evidence as to the Turkish currency law which has been given in the present case was not given in the previous case; the fact which the Board accepted as established before them, namely that in Cyprus in 1930 the Cyprus £ note and the sovereign were in practice interchangeable was negatived by the evidence in the present case. There are also various other matters of fact and evidence not here necessary to enumerate in detail, which compel this Board to examine the question of construction afresh in the light of the circumstances proved before them and material to be considered in deciding what is the true construction of the contract and also in understanding the practice adopted under the contract. These matters were not before the Board in (1934) A C 354.[7] It is thus not possible for the Board to hold, as was done in (1934) A C 354,[7] that the equivalent in Cyprus currency as obtained by the formula of the *regime usite* was or was intended to be a real equivalent of gold or that it was merely exegetical of a basic contract which was a gold contract.

It is necessary to consider one other case which recently came before this Board, (1930) A C 277.[8] In that case, Chakarian, who had been an employee of the defendant Bank, sued in the Cyprus Court claiming that he was entitled to damages for wrongful dismissal from the Bank's service. At the date of his dismissal he had been serving in Turkey. It was held by the Courts below and by this Board that his claim was justified and that he was entitled to damages. The question arose as to the correct amount of damages to be awarded to him on the footing that he was serving in Turkey at the material date. His salary had been paid according to the system in vogue in Turkey, the nature of which has been explained above. The effect of that system was to give a monthly salary expressed in terms of Turkish currency arrived at by converting into Turkish currency the sterling figure into which the basic salary had been converted by the conventional coefficient, presumably with due regard also to any extra allowances. The Board agreed with the majority of the Judges of the Supreme Court that this was the basis on which the pension to which Chakarian would have been entitled was to be calculated. There was no suggestion that the figures were to be taken as on a gold basis. The only point at issue was whether the rate of conversion of the figure of Turkish currency for the purpose of a decree in sterling was the rate current at the time of dismissal or that current at the date of the decree. The rate for the former date which was accepted as a true date was taken by agreement at 720 piastres to the pound. If this method was correct, as the Courts held that it was, it is evident that the matter was not dealt with as on the footing of a parity with gold. In (1934) A C 354,[7] the Board did not, as their Lordships think, appreciate the effect of that decision which the Board regarded as showing that the salary was assumed to be, even in Turkey, a salary in Turkish gold pounds. Their Lordships now have had the advantage of the elaborate evidence on the Turkish currency law and are unable to accept that view. They agree with the decision of 1930 which is consistent with the decision they now arrive at in the present case, and is not consistent with the decision in (1934) A C 354.[7]

In coming to the conclusion that the appeal should be allowed, the Board have had to consider what order should be made in their judgment on the question of costs. If the respondent were ordered to pay the costs as would be done in the ordinary course, it would amount in effect to depriving him of his pension for the future and indeed in all probability to impose a much more serious liability. The appellants, however, through Mr. Pritt, have shown that they have appreciated what hardship to the respondent would be thus involved and have stated that they are willing to leave the question of costs to the untrammelled discretion of this Board. Their Lordships feel that this case should be treated as one of very exceptional character particularly because of the great conflict of judicial opinion, and of the importance of having a decision which may govern in future many other cases under

8. Ottoman Bank v. Chakarian, A I R 1930 P C 110=(1930) A C 277=142 L T 465=99 L J P C 97 (P C).

the pension regulations. As the appellants have very fairly and generously left the matter to them, they feel justified in taking the view that no order should be made as to costs either here or below. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the judgments of both Courts in Cyprus set aside and the action dismissed.

K S./R.K. *Appeal allowed.*

Solicitors for Appellants —
Bischoff, Coxe & Co.

Solicitors for Respondent —
Gisborne & Co.

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(*From Madras*)

3rd December 1937

LORD WRIGHT, SIR GEORGE LOWNDES AND SIR GEORGE RANKIN.

Balasubrahmanya Pandya Thalaivar — Appellant.

v.

M. Subbayya Tevar and another — Respondents.

Privy Council Appeals Nos. 84 and 113 of 1936.

**** (a) Hindu Law — Adoption—Widow—Madras Presidency — Adoption by widow would be valid only if made with authority of husband or with assent of his kinsmen—Mere association in adoption made by husband is no indication of implied authority to her to make second adoption—Assent of kinsmen need not necessarily be of agnates—Widow has no residuary power to adopt of her own volition in absence of sapindas.**

Under the interpretation of the Mitakshara law, as generally accepted in the Madras Presidency, an adoption by a widow would be valid only if made under the authority of the lady's husband, or failing that with the assent of his kinsmen. Though the requisite authority need not necessarily be express, yet in order to constitute an implied authority there must be circumstantial evidence of a cogent character. Where there is nothing to show that the husband ever contemplated a second adoption, or that he was prepared to leave the selection of another boy to his wife, the mere association of the wife in an adoption by the husband is no indication of an implied authority to her to make a second adoption if the first boy died in infancy. Further, as to the assent of the kinsmen, it cannot be held that the only kinsmen whose assent need be sought should be agnates of the husband nor can it be held that under the Madras law there would be any residuary power in the widow to adopt of her own volition in the absence of sapindas. [P 35 C 1, 2; P 36 C 1]

(b) Privy Council — Question of fact — Inference of intention from circumstances.

Whether a particular intention can be inferred from a particular set of circumstances is rather a question of fact than of law. [P 35 C 2]

**** (c) Hindu Law — Succession — Mitakshara law—Atma Bandhus—In deciding precedence in succession, nearness of degree should be the test and not religious efficacy—Religious efficacy can be considered only if test of proximity fails — Mother's brother succeeds in preference to father's sister's son.**

According to Mitakshara law, atma bandhus have precedence in question of succession over pitri bandhus and matri bandhus. Among atma bandhus inter se and among bandhus of the same class, the test to decide precedence in succession is propinquity and not the religious efficacy. The test of religious efficacy is however an admissible test and can be considered only when the test of proximity fails. So between mother's brother of the propositus and father's sister's son, the former is entitled to succeed: *A I R 1931 P C 268 and A I R 1922 P C 33, Explained.* [P 36 C 1; P 37 C 1, 2]

(d) Madras Court of Wards Act (1 of 1902), S. 34—Confirmation given after death of ward is sufficient.

The Proviso to S. 34 fixes no time within which confirmation must be made. Hence the confirmation given to the ward's disposal of property after the death of the ward or after the Court of wards had given up possession of the estate is sufficient. [P 38 C 1]

A. M. Dunne and P. V. Subba Row — *for Balasubrahmanya Pandya Thalaivar.*

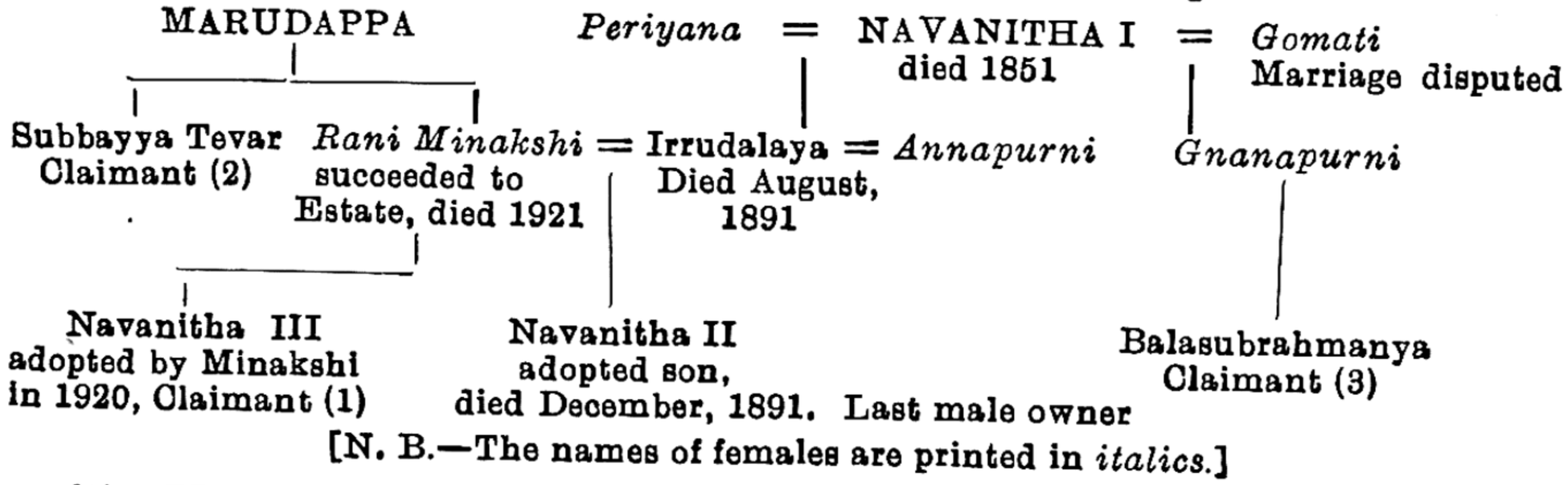
L. DeGruyther, C. Sidney Smith and T. P. Gopalkrishna Aiyar — *for M. Subbayya Tevar.*

L. P. E. Pugh and J. E. Godfrey — *for Murugayya Tevar and Navanithakrishna Marudappa Tevar.*

Sir George Lowndes.—In these consolidated appeals the main question to be decided is as to the right of succession to the Uttumalai Estate situated in the Tinnevelly District of the Madras Presidency. There are now three claimants each of whom filed separate suits in assertion of his claim and has appeared by counsel before the Board in support of it. They are respectively:

(1) Navanithakrishna Marudappa Tevar who claimed by adoption to the father of the last male holder. He will be referred to for convenience as the "adopted son"; (2) Subbayya Tevar, and (3) Balasubrahmanya, each of these last-mentioned denying the validity of the adoption and claiming to be the nearest sapinda of the last male holder. There were other claimants in the Indian Courts and other parties to the suits, but none of them have appeared before the Board and they may be disregarded for the purpose of these appeals.

The following pedigree sets out the position of the respective parties:



[N. B.—The names of females are printed in *italics*.]

Navanitha II, the last male owner, was duly adopted by Irrudalaya and his second wife Minakshi to the exclusion of the first wife Annapurni, and after his death his adoptive mother Minakshi (hereinafter for convenience referred to as the "Rani") was held entitled to succeed for a Hindu widows' estate: *see* 26 I A 246.[1] In 1901 she handed over the management of the Uttumalai Estate to the Court of Wards, who remained in possession until her death in 1921, when the disputed succession opened. On 28th January 1920, the Rani purported to adopt Navanitha III. She also made certain testamentary dispositions in his favour which are disputed by the other claimants and which will be considered by their Lordships in a later part of this judgment.

As regards the main question, the succession to the estate, it is obvious that if the adoption of Navanitha III is valid, no other question will arise. Their Lordships will therefore proceed in the first instance to deal with his claim. The factum of the adoption, though at first in dispute, is now admitted, but under the interpretation of the Mitakshara law as generally accepted in the Madras Presidency, and by which the parties are governed, it would only be valid if made under the authority of the lady's husband, or failing that, with the assent of his kinsmen. In the present case, the express authority of the husband was alleged, but it has been negatived by both Courts in India, and in accordance with the established practice of the Board, these concurrent findings on what is a pure question of fact must be held conclusive. It was however contended in the Indian Courts that in the circumstances of this case an implied authority should be inferred. The argument was that the association by Irrudalaya of the Rani with himself in the adoption of Navanitha II (the last male holder) which put her in the position of his adoptive mother, necessarily implied authority to make a second adoption if the first boy died (as he did) in infancy. This contention was repelled by the Indian Courts. Both the District Judge by whom the suits were tried and the High Court on appeal held that the mere association of one wife in an adoption by the husband was no indication of an authority to her to make a second adoption. They therefore held that the adoption of Navanitha III was without authority.

There is nothing to show that the husband ever contemplated a second adoption or that he was prepared to leave the selection of another boy to his wife. Their Lordships are not laying down that the requisite authority must necessarily be express, but they agree with the District Judge that "in order to constitute an implied authority there must be circumstantial evidence of a cogent character", and they are satisfied that no such evidence was forthcoming in the present case. Whether a particular intention can be inferred from a particular set of circumstances is, their Lordships think, rather a question of fact than of law, and on this question the Courts in India have concurred in their findings. But apart from this, their Lordships see no reason to differ from the conclusion at which they arrived. A further question was debated in the Indian Courts as to the necessity of the consent of the Court of Wards to the adoption, but having regard to what has been said above, it is not now material to discuss it. No assent of kinsmen is alleged, but in the plaint a somewhat novel point was taken, that there being no agnates of Irrudalaya in existence at the time of the adoption, whose assent could be sought, the lady had an inherent authority to adopt of her own volition. An issue was

1. Annapurni Nachiar v. Forbes, (1900) 23 Mad 1 =26 I A 246=9 M L J 209=7 Sar 591 (P C).

raised as to this in the trial Court, but the contention was subsequently abandoned. It found no place in the argument before the High Court and is not referred to in the printed case filed on behalf of the adopted son before the Board, but the contention is sought to be revived before it by his counsel. Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates, nor is there any evidence as to what sapindas of Irrudalaya were in existence at the date of the Rani's adoption. Their Lordships think moreover that it would be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas, but the contention was so clearly abandoned in India that it is not necessary to consider it further.

For these reasons their Lordships are of opinion that the judgments of the District Judge and the High Court on the claim of the adopted son to the estate were right and that his appeal upon this part of the case fails. Their Lordships now turn to the contentions of the other two claimants, Subbayya and Balasubrahmanya. They are respectively the mother's brother and the son of an alleged half sister of the father, of the last male owner. The marriage of Gomati (*see* the pedigree above) to Navanitha I is not admitted. The District Judge held that it was not proved and the High Court did not think it necessary to decide the question as, assuming it to be established, they affirmed the superiority of Subbayya's claim. Their Lordships for the purpose of this judgment will make the same assumption. Both of these claimants admittedly belong to the class of cognates known to the Hindu law as atma bandhus, i. e. cognates of the propositus (the last male owner) who have precedence in questions of succession over pitri bandhus, i. e. cognates of his father, and matri bandhus, the cognates of his mother. The question between the claimants is as to the rights of such atma bandhus inter se. It is not disputed that Subbayya as the maternal uncle is a step nearer in degree to the propositus than the rival claimant as father's sister's son. But, for the latter, it is contended that nearness in degree is no test as between atma bandhus, and that the sole criterion should be religious efficacy, i. e. which of the two claimants would by his religious offerings confer most benefit upon the propositus in the other world, and it is admitted that upon this test Balasubrahmanya's claim would prevail. The question between them therefore seems to be a clear cut one, namely which of the two is the proper test to apply. At first sight it would appear that the question is covered by the direct authority of the Board : 58 I A 372.[2] In this case it was laid down that the test of religious efficacy was applicable between atma bandhus only when the parties were equal in degree. At the time the District Judge gave his judgment, this case had not come up to the Board, but a decision given ten years previously (48 I A 349[3]) in which a question as to the right of succession between atma bandhus was discussed, was before him, and relying upon it and upon the view taken in Mayne's Hindu Law he held that Subbayya was the preferential heir. It was not until six years later—a delay which their Lordships greatly regret—that the appeal was heard in the High Court, and by that time the report in 58 I A 372[2] was available. The learned Judges thought that any possible doubt as to the rule to be applied was set at rest by this later decision, and they accordingly affirmed the judgment of the District Judge on this point.

Balasubrahmanya has nevertheless appealed to His Majesty in Council against the rejection of his claim. In his petition to the High Court for leave to appeal, it was urged that the learned Judges of the High Court had misinterpreted *Jotindra's case.*[2] But before their Lordships, Mr. Dunne, with characteristic courage, admits that he cannot distinguish it, but attacks the decision as unsound and in conflict with the reasoning in the earlier case, 48 I A 349.[3] It might be sufficient in the present case to say that the question is clearly covered by the latest decision of the Board, but in view of the able argument of Mr. Dunne it may perhaps be desirable to examine the position a little more closely. The argument put shortly is that in 48 I A 349,[3] in which the contest was between the father's sister's son's son and the maternal uncle, the Board

2. Jotindra Nath Roy v. Nagendra Nath Roy, (1931) 18 A I R P C 268 = 135 I C 637 = 58 I A 372=59 Cal 576 (P C).
3. Vedachela Mudaliar v. Subramania Mudaliar, (1922) 9 A I R P C 33=64 I C 402 = 48 I A 349=44 Mad 753 (P C).

expressly affirmed certain rules which had been enunciated by Muthusami Ayyar J. in a previous Madras case, 16 Mad 23[4] at p. 30. The last of these rules was

> that as between bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in the Viramitrodaya a ground of preference.

The affirmation of this rule, it was contended, made spiritual benefit the sole test as between members of the class and treated nearness of degree as irrelevant. Mr. Dunne admitted that agnatic succession under the Mitakshara law as interpreted in Madras depends solely upon proximity of blood connexion, and that the Bengal doctrine of religious efficacy has no application, but he claimed that the rule quoted above established that among cognates the exact opposite was the case, i. e. that proximity of blood relationship went out altogether and religious efficacy came in as the sole test. Their Lordships think that such a change over would be, to say the least of it, remarkable. Mr. Mayne, in a passage that has often been quoted before the Board, after a detailed discussion of the Bengal law, says (S. 509):

> When we go a stage back to the Mitakshara, and still more to the actual usage of those districts where Brahmanical influence was less felt, the whole doctrine of religious efficacy seems to disappear. In the chapters which deal with succession, the Daya Bhaga and the Dayakrahma Sangraha appeal to that doctrine at every step, testing the claims of rival heirs by the numbers and nature of their respective offerings. The Mitakshara never once alludes to such a test.

It is also clear that the Viramitrodaya, Ch. III, pt. VII (5), which is the principal authority for the well-recognized priority of atma bandhus over the two other classes, clearly bases it on propinquity. Their Lordships think therefore that it would be impossible to say that under the Mitakshara the principle of propinquity does not apply beyond agnatic succession. A reference to the judgment delivered by Mr. Ameer Ali in 48 I A 349[3] at page 354, makes it clear that no such change over in the case of cognates was contemplated, and the rule above referred to, which was affirmed towards the end of the judgment, obviously does not make religious efficacy the only test among bandhus of the same class, though it does make it an admissible test, and it is perhaps worth noting that the view taken by the Subordinate Judge, to whose judgment their Lordships have referred and which was held to be well founded, was that the religious test was only applicable if the proximity test failed. The final conclusion at which the judgment of the Board then arrived is stated as follows (page 364):

> In the present case before their Lordships, the appellant and the deceased were sapindas to each other; and he (the appellant) is undoubtedly nearer in degree to the deceased than Subramania (the respondent) He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no pinda to the deceased's ancestors. On all these grounds their Lordships think that the view taken by the Subordinate Judge was well-founded.

It is difficult to suggest that the Board here discarded the test of nearness of degree, and adopted only that of religious efficacy; they clearly applied both, and it is perhaps not without significance, in view of what the Subordinate Judge had said, that nearness of degree is put first. In 58 I A 372[2] the question was between atma bandhus, admittedly equal in degree, so that the test of proximity was no guide and it was laid down strictly, as their Lordships think, in accordance with the general scheme of the Mitakshara, that it was only when the test of proximity failed that religious efficacy came in. Their Lordships can see no inconsistency between the two decisions of the Board, and no antagonism between the later decision and the rule enunciated by Muthusami Ayyar J. upon which Mr. Dunne relies so strongly. They must therefore confirm the decision of both Courts in India that as between claimants 2 and 3, Subbayya as nearer in degree to the last male owner is entitled to succeed to the estate. There remains to be considered the testamentary dispositions made by the Rani in favour of her adopted son. By her will dated 9th May 1921, the due execution of which is not now disputed, she bequeathed to him the accumulations of the income of the estate amounting to Rs. 89,000 and her jewels, vessels, etc. The District Judge held that the savings were not her property but went with the estate, and that it was not established that the jewels, etc., in her possession at the time of her death were her personal property. He therefore rejected the claim of the adopted son. The High Court on appeal came to a different conclusion. They held that the savings which were

4. Muthusami v. Muthukumarasami, (1893) 16 Mad 23=2 M L J 296.

found to be a sum of Rs. 80,900 in the hands of the Court of Wards and Rs. 9244 in the lady's own possession, were the personal property of the Rani and would pass under her will. With regard to the jewels, etc., they came to the same conclusion. Subbayya has appealed against this decision, but the correctness of the High Court's finding has not been seriously contested before the Board in either case, and their Lordships see no reason to differ from the High Court's findings.

A further point however remains. The Rani's estate being in the hands of the Court of Wards, she was not qualified to dispose of her property by will without the consent of the Court, provided nevertheless that the Court could confirm a will made without its previous consent (Madras Court of Wards Act, 1902, S. 34). In this case there was admittedly no previous consent, but the Court of Wards, which had been a party in each of the suits, intimated its readiness to confirm the will so far as the dispositions made by it were otherwise legally valid. The High Court accordingly after affirming the validity of the bequests referred to above, invited the Court of Wards to confirm them, and the Court's confirmation has been given. It is however contended that no confirmation could be given after the death of the Rani, or after the Court of Wards had given up possession of the estate, which they admittedly did in June 1921. Their Lordships think that there is no substance in this contention; the proviso to S. 34 fixed no limit of time within which such confirmation must be made, and their Lordships think that in this respect the confirmation is sufficient.

Another and possibly a more serious objection was taken to the confirmation as given, namely that it confirmed part only of the will. Besides the bequests of the savings and jewels, the Rani also purported by her will to make over to the adopted son the management of a temple on the estate with a certain endowment for the idol. No issue had been raised as to this in the lower Court, and the High Court had refused to deal with it, leaving the question to be decided, if necessary, in another suit and the confirmation by the Court of Wards does not purport to cover this part of the will. At the hearing of the appeal however both parties were satisfied that all questions as to the temple should be left over, and the Court of Wards' confirmation treated as sufficient for the purposes of the present appeal. Their Lordships are therefore relieved from the further consideration of this objection. For the reasons stated above their Lordships will humbly advise His Majesty that each of the present consolidated appeals should be dismissed, that the decrees of the High Court so far as they affect the parties to these appeals should be affirmed, including such orders as have been made thereunder as to costs. Their Lordships think that there should be no order as to costs before the Board. A petition to adduce further evidence lodged by M. Subbayya Tevar was not supported and stands formally dismissed.

D.S./R.K. *Appeals dismissed.*

Solicitors for Balasubrahmanya Pandya Thalaivar—*Hy. S. L. Polak & Co.*

Solicitors for M. Subbayya Tevar — *Sanderson Lee & Co.*

Solicitors for Murugayya Tevar and Navanithakrishna Marudappa Tevar — *Nehra & Co.*

*** A. I. R. 1938 Privy Council 38**

(From Allahabad : A I R 1934 All 179)

25th November 1937

LORD MAUGHAM, SIR SHADI LAL AND SIR GEORGE RANKIN.

Nawab Sikandar Begam — Appellant.

v.

Zulfikar Wali Khan (minor), and others — Respondents.

Privy Council Appeal No. 71 of 1935, Allahabad Appeal No. 6 of 1934.

*** (a) Registration Act (1908), S. 35—Party executing document stating, at time of registration, facts different from those stated in document—Deed should be re-executed.**

Where a party who has executed a document admits at the time of registration the execution and completion of the document but states certain facts different from those stated in the deed, it is advisable to take the usual and regular course of re-executing the deed with the modifications which the parties have agreed to. [P 39 C 2]

(b) Pardanashin Lady — Deed of gift executed by old pardanashin lady—Knowledge of deed and her intention to execute it must be proved—Proof of independent advice is not necessary.

Where a deed of gift is executed by a pardanashin lady of considerable age, it is for the opposite party to discharge the onus of showing that the lady really understood and intended to execute the deed of gift but it is not necessary to prove independent advice : *36 All 81 (P C)* and *A I R 1925 P C 204, Rel. on.* [P 40 C 1]

Cyril Asquith and W. Wallach —
for Appellant.
A. M. Dunne and Dr. Majid —
for Respondents.

Lord Maugham.—This is an appeal from a decree of the High Court at Allahabad, dated 5th December 1933, which reversed the decree of the Court of the Subordinate Judge of Bareilly, dated 30th July 1929. The plaintiff-appellant is a pardanashin lady, who at the date of the suit was, as their Lordships are given to understand, nearly 60 years old. She claimed in the suit instituted by her a declaration that a certain deed of gift dated 13th April 1928, executed by her in favour of defendant 2, was obtained through fraud; that she did not understand the contents of it; that she could not get independent advice in respect of it; that the conditions for consideration were not fulfilled; that she had no intention to execute the same, and that therefore it was null and void as against the plaintiff. The person in whose favour the deed of gift was executed, (defendant 2), was her grandson, a minor, who is now respondent 1 (commonly called Majjan), a child whom she had brought up from the age of only 10 months old on the death of his mother and on whom, according to the evidence, she had bestowed much love and affection. Defendant 1 (now deceased) was her younger son, Iftikhar Wali Khan, the guardian of the donee. The gift had been completed by delivery of possession shortly after the deed had been registered. The High Court at Allahabad in a very able judgment carefully considered the nature of the transaction embodied in the deed of gift. They examined the evidence as to the income of the appellant, and the liabilities of her estate and as to the benefits which were to come to her under the deed of gift. It will not be necessary to mention all the figures; but it is material to state that the gift was a gift for consideration, that it is plain that the lady, who was at the date of the deed about 58 years of age, derived substantial advantages from its execution and that it was beyond doubt a reasonable document for her to enter into. It is of first importance to observe that the deed was not an improvident document which the appellant, if adequately advised, could not properly have entered into, but is one which might well be to her real advantage. There was a great deal of dispute as to the extent of her knowledge of the precise terms of the deed before it was executed and a little dispute as to what took place when three days after the execution of the deed it came in for registration in due course. Their Lordships are relieved from the necessity of going carefully through the evidence on these two points, because the whole evidence has been most admirably and carefully summarised and commented upon in the judgment of the High Court, and they think it quite unnecessary to repeat the statements and the considerations which are contained in that judgment. This curious fact however should be mentioned that when the contents of the document were read out and explained to the appellant by the Sub-Registrar, upon the occasion of the registration of the deed on 16th April 1928, the appellant stated that she admitted the execution and completion of the document, but added that the sum of Rs. 300, and not Rs. 250 as stated in the deed, had been agreed upon to be paid for her monthly maintenance; and she also stated that it had been agreed that, apart from that monthly amount, grain and fuel would be supplied to her 'in accordance with her expenses', and she added that she accepted the gift subject to the conditions there stated. The Sub-Registrar stated upon the documents the facts which have been mentioned and the contentions made by the appellant. The thumb impression and seal of the plaintiff was affixed below this statement as required by the Sub-Registrar, and the witnesses included, it may be mentioned, Iftikhar Wali Khan, the guardian of the donee, Majjan. It seems to their Lordships that if there had been any dispute before them as to whether in these peculiar circumstances the appellant was entitled to Rs. 300 and to the grain and fuel as mentioned in this note of the Sub-Registrar, rather than to the Rs. 250 as mentioned in the deed of gift, it would be necessary to consider the effect of the Registration Act, particularly S. 35, and also to consider certain authorities in order to ascertain the precise legal effect of such a statement as this after the execution of the deed; and their Lordships must observe that it would have been much better to have taken the more usual and regular course of re-executing the deed with the modifications which the parties had agreed to.

It so happens however that the High Court at Allahabad have decided that in

the circumstances of the case the conditions added by the appellant at the time of registration were admissible in evidence and binding on the donee. In coming to this conclusion no doubt they were to some extent influenced by the fact that her signature is above the endorsement and that one of the witnesses was her son Iftikhar Wali Khan, the guardian for the infant donee, who apparently made no protest or no effective protest as regards the statement made by the appellant. However that may be, the respondents to the present appeal do not seek to disturb the view of the High Court at Allahabad on that point and are content that it should be taken that the deed operates as if the Rs. 300 were substituted for the Rs. 250 and as if the appellant was entitled to the grain and fuel which is referred to in the Sub-Registrar's record of what the appellant was claiming at the time of the registration. In these circumstances it does not seem necessary to their Lordships to express an opinion upon this part of the case.

As regards the substance of the proceedings, their Lordships are satisfied that the grounds on which the appellant seeks to have the deed of gift set aside have failed. It is true that the appellant is a pardanashin lady of considerable age and it is also true that at one time it was thought that in such a case there was a necessity for independent advice; but fortunately there are two decisions which in the view of their Lordships completely explain the law applicable to transfers by pardanashin ladies so far as the present question is concerned. Those cases are 41 I A 23[1] and 52 I A 342,[2] where there is an illuminating judgment delivered by Lord Sumner, in which he dealt with a case where an illiterate pardanashin lady had executed a deed without independent legal advice. In the present case it was for the defendants in the action to discharge the onus of showing that the plaintiff really understood and intended to execute the deed of gift but it was not necessary to prove independent advice. As regards the other various contentions put forward by the appellant and urged before them with equal ability and conciseness by Mr. Asquith, their Lordships are satisfied with the reasons given and the analysis of the facts contained in the judgment of the High Court; and they have therefore come to the conclusion that the present appeal fails and must be dismissed with costs. They will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellant — *T. L. Wilson & Co.*

Solicitors for Respondent — *Francis & Harker.*

1. Kali Bakhsh Singh v. Ram Gopal Singh, (1913) 36 All 81=21 I C 985=41 I A 23=16 O C 378=12 A L J 115 (P C).
2. Farid-un-Nissa v. Mukhtar Ahmad, (1925) 12 A I R P C 204=89 I C 649=52 I A 342=28 O C 338=47 All 703 (P C).

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(*From Oudh*)

19th March 1937

LORD BLANESBURGH, SIR JOHN WALLIS AND SIR GEORGE RANKIN.

Lal Durga Bakhsh Singh — Appellant.

v.

Rani Brij Raj Kuar — Respondent.

Privy Council Appeal No. 91 of 1934, Oudh Appeal No. 3 of 1933.

Hindu Law—Adoption—Evidence — Claim by appellant to be adopted son of deceased Raja in Oudh—Adoption not registered—No entry of expenses of adoption in books of Raj. —Sapinda of Raja performed by widow and not appellant—Negligence on part of appellant to go in witness box—Adoption held not proved.

The appellant claimed to be the adopted son of a deceased Raja in Oudh. The adoption was not registered as required by the Oudh Estates Act and was neither known to nor suspected by Government. The acts of the appellant on the face of them entirely negatived any idea that he had become or believed that he had become the adopted son of the Raja. The widow and not the appellant performed the sapinda for the Raja and the appellant performed the sapinda for his natural father. The books of the Raj contained no entry of the expenses of the alleged adoption. The appellant neglected or refused to go in the witness box and elected to leave his conduct entirely without explanation:

Held that adoption was not proved : *14 M I A 346 (P C), Ref.* [P 47 C 2; P 48 C 1, 2]

L. DeGruyther, A. M. Dunne and J. M. Parikh — *for Appellant.*

H. K. Ghose (of Oudh Bar) and V. R. Krishna Menon — *for Respondent.*

Lord Blanesburgh.—This is an appeal from a decree dated 11th January 1933 of the Chief Court of Oudh at Lucknow in appearance modifying, but in principle reversing a decree dated 5th January 1931 of the Court of the Subordinate Judge, Sultanpur. The suit in which these decrees were pronounced was commenced on 11th

April 1929, by the present respondent, the widow of the Raja Partab Bahadur Singh of Kutari, against the present appellant to recover payment of Rs. 15,243 and accrued interest alleged to be due to the respondent for maintenance under a deed of gift of 23rd May 1926, made in favour of the appellant by his uncle, Baghwan Baksh Singh. By that deed, amongst other provisions made for the appellant, and together also with benefits for the infant son of the donor, and for the respondent, the appellant, taking title thereto from the donor, was constituted in effect tenant for life of the Kutari estate, with the exception of two villages otherwise donated, but he was in return laid under an obligation to provide maintenance for the respondent at the rate of Rs. 5000 a year. It was in respect of his liability in this regard that the respondent's suit was brought.

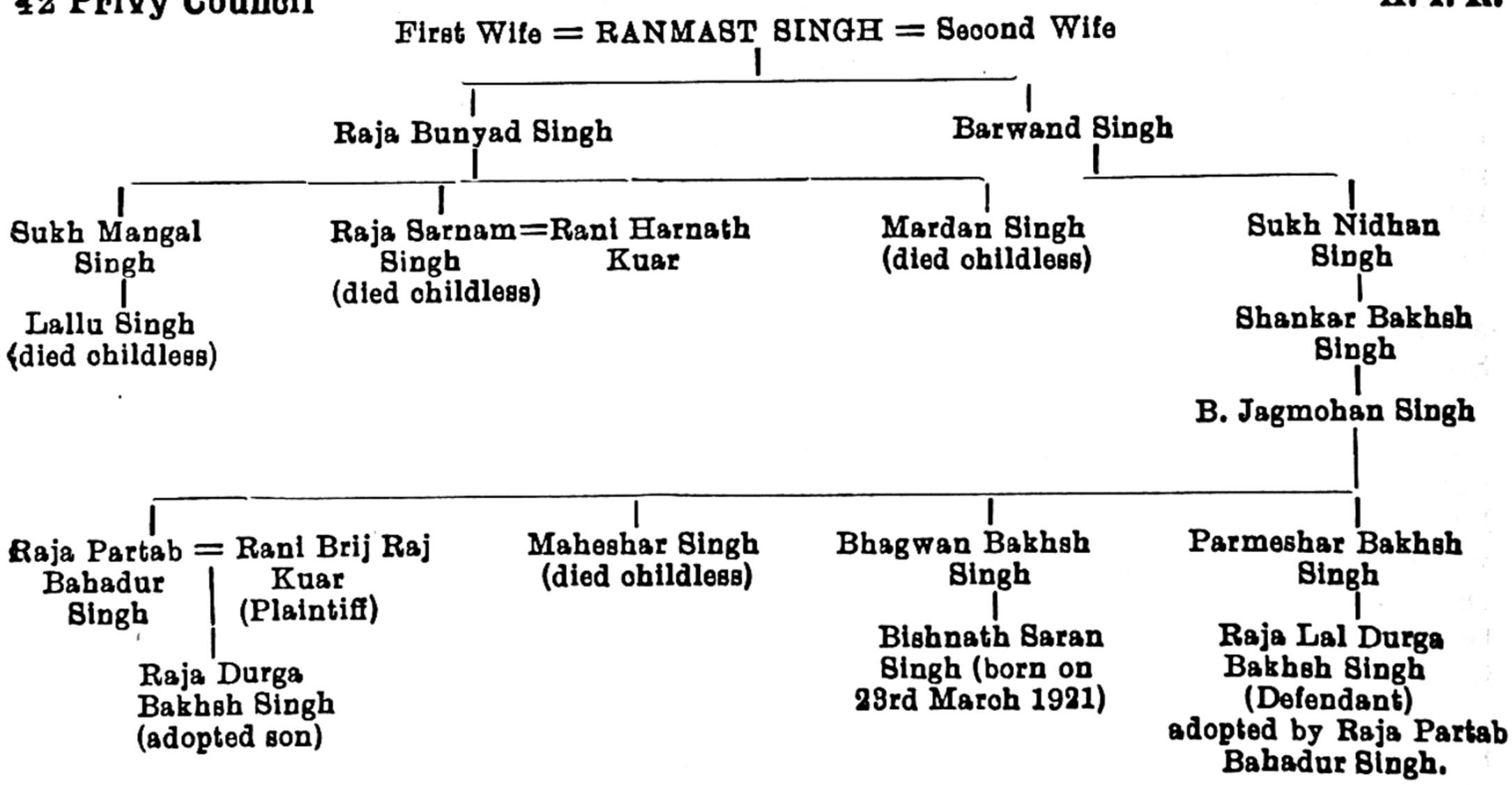
The appellant's answer to the suit was that the deed of gift in question, with a deed of relinquishment of the Kutari estate of even date made by the respondent in favour of Bhagwan Baksh Singh, was part of a fraudulent arrangement designed by the respondent and Bhagwan in the interest of the infant son of Bhagwan to deprive the appellant of the inheritance of that estate, to which, as both well knew, he was entitled as the adopted son of the late Raja and as devisee under his will. To these allegations the reply of the respondent, confining that reply at present to the matters with which their Lordships must primarily concern themselves, was that the appellant, the nephew of the Raja, had never been taken in adoption by him: that the will of the Raja propounded by the appellant was a forgery: that the deeds of relinquishment and gift in question constituted a valid family arrangement, conceived in the interest of the appellant himself; that he had accepted the benefit of the arrangement; that except under the deed of gift he had no interest whatever in the Kutari estate and that as he had accepted title under that deed and was in actual possession under that title, the maintenance claimed was indisputably due and payable.

The trial was a protracted one; and at the close of the evidence the two questions for decision and to which all else was subordinate were seen to be these: 1. Had the appellant proved his adoption by Partab Bahadur Singh, Raja of Kutari, unregistered as that adoption was? 2. Had the will, also unregistered of date the 28th June 1918, propounded by the appellant, been proved by him to be the will of the Raja? Both of these questions the learned Subordinate Judge answered in the affirmative. The deed of relinquishment and the deed of gift also, he held to be a fraud upon the appellant and worthless as against him. But the respondent was by general law entitled to maintenance out of the estate and he accordingly decreed Rs. 6000 in respect of arrears and a sum of Rs. 200 a month as the proper maintenance for the widow of a Raja to be paid by the appellant now that his succession to the Raj had been established as against the respondent. On appeal from that decree the Chief Court, disagreeing with the learned Subordinate Judge, answered both questions in the negative, and, for reasons which the learned Judges gave, held the appellant bound, *in hoc statu*, by the terms of the deed of gift. The Court accordingly on 11th January 1933 decreed the respondent's claim in full. Hence this appeal. The narrative of relevant facts upon which the Board must now embark is necessarily somewhat involved even when confined, as it will be, to those facts which have a bearing upon the two main questions at issue. The narrative however will be simplified by reference to the family pedigree which, as the most convenient in point of arrangement, their Lordships transcribe, as it appears in the appellant's printed case. [*see next page*]

The parties are Hindus, subject to the Mitakshara law as interpreted by the Benares School. It was with the Raja Surnam Singh named in the pedigree that the summary settlement of the Kutari estate was made. A sanad in respect of it was granted to the Raja on 25th October 1860. One of the conditions of the sanad was that :

> - The estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please.

The wide generality of these words may not be without its significance in the present discussion. On 12th January 1869, the Oudh Estates Act, No. 1 of 1869, came into force and the Kutari estate was made subject thereto. The name of the Raja Surnam Singh was entered as a Talukdar



in list 1 (No. 238) and also in list 2 (No. 105) prepared under S. 8 of the Act. Little more than a month later, namely on 27th February 1869, the Raja died without issue, predeceased by his two brothers each of whom had died without issue then living, but survived by his widow, the Rani Harnath Kuar, in whose favour he had made a will dated the 17th December 1868, under which the Rani succeeded to the estate. She remained in possession until her death. The true construction of the Raja's will, with special reference to the nature of the interest in the estate taken under it by the Rani, was in both Courts in India the subject of prolonged discussion—the appellant's contention broadly being that the Rani's interest in the estate was an absolute interest : that of the respondent being that it was a life-interest only. The decision of both Courts was that the Rani under the will took in the estate an absolute interest.

Their Lordships were not invited to review that finding. Its relevance upon the two questions now at issue, not perhaps immediately obvious, will emerge presently. For the moment, it is enough to say that no finding as to its meaning can deprive of their effect the final and very significant words of the will, in which the Raja declared that the Rani "shall be competent to appoint a successor for this Raj from amongst the near relations of my family". In these words may lurk the explanation of much that subsequently happened. The Rani died on 5th May 1885, and notwithstanding a contention to the contrary put forward by the appellant in his written statement, it was held by the Subordinate Judge and it is now common ground that she was a Talukdar and that the estate throughout her life was and at her death remained subject to the Act. She was succeeded in the Raj by the Raja Partab Bahadur Singh—later the respondent's husband—then a boy of 14. *Pace* the appellant, there is no mystery about Partab's succession or the circumstances which led to it. The story is told in the mutation proceedings which followed upon the Rani's death and in official documents which then passed and remain on record.

It was to an act imputed to the Rani herself that the succession of Partab Bahadur Singh and not of another was due. She, acting presumably under the power conferred upon her by the last words of the Raja's will, is definitely represented to have declared Partab Bahadur Singh to be her heir—although no record is so far forthcoming of when or how she did so. The respondent in her replication alleges that the declaration was made in a deed dated 18th April 1886, but the learned Subordinate Judge records that no proof of such a deed was adduced before him and no print of it appears in the record. As is seen in the pedigree, Partab Bahadur Singh was himself, according to the rule of primogeniture, fourth only in the order of succession in Raja Surnam's family. His great grandfather — Sukh Nidan Singh — then still alive was the next heir : his grand-

father Shankar Bakhsh Singh was second : his father B. Jagmohan Singh was third : he himself, the eldest son of his father, came next. These facts were brought to the notice of the Deputy Commissioner by a report of the Tahsildar of 18th May 1886, and that officer was as a result directed to inquire of the three heirs prior in estate to Partab Bahadur Singh whether they were willing to relinquish any rights of theirs in favour of the nominee of the Rani. And they did relinquish all their rights. By a registered deed of 8th June 1886, these three forbears of Partab Bahadur Singh thereby, after reciting that the Rani had before her death appointed him " and expressed a wish that he should become her successor and heir", relinquished in the amplest terms, "owing to the aforesaid wish of the Rani" in favour of Partab all right and claim which each of them had in the estate, and they gave to him all the land and moveable and immovable property of every sort to which each of them respectively became entitled at the death of the Rani. Next, following still the course of Partab's accession to the Raj, there came an application for mutation put forward by another member of Raja Surnam's family, Har Duth Singh, who claimed the estate against Partab. But this claim was rejected on 21st July 1886 (Record page 259) on the ground that the claimant was not under the Act of 1869 a person so entitled.

Finally, on 8th June 1886, an order was made by the Deputy Commissioner of Sultanpur declaring Partab Bahadur Singh to be prima facie entitled to the property and ordering that he be put in possession and that all necessary entries in the revenue records be made. And on 8th November 1886 an appeal from that order was dismissed by the Commissioner. The order of 8th June so finally confirmed was followed on 21st September 1886 by a communication from the Secretary to Government, N. W. P. and Oudh, intimating to the Commissioner, Bareli Division, that as the father and grandfather and great-grandfather of the minor, Partab Bahadur Singh, were understood to have waived their claims to the title of Raja, the minor might be officially addressed as Raja and so styled in public documents. And thus a possession avowedly under the Act—the fact which is for present purposes all important—was given to Partab Bahadur Singh and his possession of the Kutari estate with the title of Talukdar recognized by Government continued, unbroken and undisturbed until his death on 28th September 1918, more than 33 years later. Their Lordships do not find in the judgments, either of the learned Subordinate Judge or of the Chief Court, any reference to this most striking and important fact. The complete neglect of it makes difficult of acceptance the conclusion reached by both Courts that Partab Bahadur Singh's possession of the Raj commenced—at the age of 14 be it observed—in a conscious trespass which ripened into ownership only by limitation. Their Lordships will refer later to the major significance of the above, in its relation to the issue of adoption now in debate.

The appellant, claiming in the suit to have been adopted by Partab, was the natural and only son of his youngest brother — Parmeshar Baksh Singh. There has been some question as to the appellant's exact age. It seems to be agreed now however that at the date of the deed of gift he was 18 years and 3 months old, that is to say he was then major. Until the birth of a son to Bhagwan years after the Raja Partab's death, he was in the family the only male of the next generation. He was throughout the Raja's life in that generation his heir presumptive. His mother died when he was very young and he came to live with the Raja and the respondent. The evidence shows that they were both attached to him : they were at pains as to his education in schools suitable for a boy of good family and the respondent after the Raja's death interested herself very actively in his marriage. In her evidence the respondent was perhaps over-anxious to show that the attentions of the Raja and herself to the appellant were not more pronounced than were their attentions to other collateral members of the family. But the respondent, the Rani, has become embittered by the appellant's quarrel with her. Their Lordships on this subject of their relations to each other prefer the general evidence to the effect stated.

Parmeshar Baksh Singh, father of the appellant, died six months before the Raja. The Raja at his own death was no more than 47—an early age which made an adoption two years earlier at the least unlikely. Bhagwan Baksh Singh was the only brother to survive him. In the

absence of any will — the will propounded by the appellant was first produced on 29th October 1929, more than 11 years after the testator's death—and ignoring for the moment the possibility of the existence of an adopted son, Bhagwan was the Raja's next heir. Bhagwan had still no son of his own, and he seems to have waived all his claims in favour of the Raja's widow, the respondent. The proceedings as a result of which mutation was effected in her name are interesting from this point of view. The claim was made by the respondent "on the ground of inheritance". As the matter related to the Taluka—this statement is not unimportant as showing that the estate was regarded as being then under the Act—the claim was transferred to the Sub-divisional Officer (Record, p. 290). The heirs in succession to the respondent were stated to be (1) Babu Bhagwan Baksh Singh; (2) the appellant "real nephew of the deceased (the Raja)" born on 31st January 1907. In the course of the proceedings, a question arose as to the devolution from the deceased Partab Bahadur Singh of the hereditary title of Raja—his own right to the title was on all hands taken for granted — and in an official report to the Deputy Commissioner, dated 5th March 1929, it was stated that under the Act of 1869 Bhagwan had a superior claim to succession over his Rani, the respondent, but that according to the custom of the family, Bhagwan had waived his right in favour of the respondent. As he had no property in his name he could not inherit the title of Raja without getting the Taluka. Moreover the appellant—he is described, be it again observed, as the nephew of the deceased Raja and the son of his third brother—was left by the late Raja and the respondent "as an heir". "It seems to me", the reporter proceeds,

> that when this boy grows up the present Rani will declare him as her husband's heir and she will then apply with the consent of Babu Bhagwan Baksh Singh that the title of Raja may be given to him,

a consummation which, strangely enough, has resulted from the deeds of renunciation and of gift now repudiated in the respondent's suit by the appellant. Mutation in favour of the respondent accordingly was made on the footing alleged. Her name was shown in the last column of the Durbar list "like other lady Talukdars. On her death the late Raja's brother or the latter's son" [a slight error this, but there is no doubt that the appellant is referred to] "will succeed to the estate as the nearest heirs" : see plaintiff's Ex. 227, 19th December 1918, an interesting contemporary official record of the position, the accuracy of which their Lordships find in the record nothing effective to displace. And so things went on: the appellant after the Raja's death remained in the care of the respondent, the Rani, just as he had been in the care of the Raja in his lifetime, the estate being managed by the respondent assisted by Bhagwan. And then on 23rd March 1921, two and half a years later, a son, Bishnath Saran Singh, was born to Bhagwan. The Rani's case as from this event is—and if her denial of any knowledge that the appellant had been adopted by Partab is true, their Lordships see no reason for doubting its correctness — that following the birth of his own son, Bhagwan's attitude towards the estate gradually changed and that in the interests of his son, he finally set up his own claim to the Raj which for himself he had been willing to waive in favour of the respondent at the time of his brother the Raja's death. It was his insistence upon this claim—such is the respondent's case—which brought about mainly at her instance and as a settlement of all questions, the deed of renunciation and the deed of gift of 23rd May 1926, already mentioned, the foundation of the respondent's claim in her suit.

Their Lordships find it convenient to refer in passing to some striking features of the arrangement effected by these deeds. It is made clear by the evidence that they were prepared with much care and under eminent and responsible legal advice taken by the respondent. One feature of them is specially notable. Bhagwan, characteristically, it may almost now be said, retains under them for himself no personal interest in the estate. More than adequate maintenance is provided for the respondent: Bhagwan's infant son and his issue become the ultimate owners of the entire Raj, and one village is made immediately available for that son's maintenance: the appellant remains for his life Talukdar of the estate other than two villages and provision is made out of one of these for his issue after his own death. For Bhagwan himself there is nothing.

It is said by the appellant that the handsome provision made for him by the deed of gift is conclusive evidence that he

was and was known to be the adopted son of the Raja. "Why otherwise," he asks, "should any provision at all have been made for me?" Their Lordships after a consideration of all the evidence and in particular the evidence of the respondent, think it only right to say that they do not accept that reasoning as, in any degree, convincing or even plausible. Whether the appellant's success in his main contentions —the establishment, that is to say, of his claim to be the adopted son of Raja Partab and the devisee under his will—would enable him to have these deeds set aside as against himself is another matter on which at the moment their Lordships say nothing. But how does the arrangement, apart from these contentions stand? In fairness to the respondent and Bhagwan, now dead, their Lordships desire to place on record their views on that subject. The result of the arrangement as will have been seen was that Bhagwan, retaining for himself no interest in the estate, had made a second renunciation as complete as his first, but this time not in favour of the Rani alone but in favour of his own infant son and of the appellant as well. Nor in the circumstances were the concessions in favour either of the Rani or the appellant—made as they were mainly at the expense of Bhagwan himself, quixotic either in relation to the one or the other. Let it be remembered that Bhagwan's claim to the whole Raj, apart altogether from any adoption of the appellant or any will by Partab in his favour, was not undisputed. There was a suggested custom in the family which favoured the Rani. Again, the provision now made for the Rani to whom, when he was sonless, Bhagwan had relinquished everything, was made without any injury, so long as he himself lived, to any interest of his son. And the same was true of the provision made for the appellant, which at the worst postponed in enjoyment but in no way destroyed that son's interest in the estate as a whole. When all these things are considered, there seems to be, in their Lordships' view, nothing unreasonable or improbable or even imprudent in Bhagwan's action in agreeing to the qualified provision out of the estate of substantial compensation for the Rani, the then Talukdar, and for the appellant with whom he had been so long associated as heir presumptive to the Raj. What more natural than a desire on his part to provide compensation for the disappointment of both, if such provision could be made, as it was, without undue injury to any immediate interests of the new heir, his son?

The respondent testified to the complete honesty of the whole transaction. Bhagwan, latterly it appears, of feeble mind, died in the course of the trial and could not be called as a witness. It is unfortunate perhaps that one or other of the distinguished lawyers on whose advice the transaction was carried through were not called to explain it. Everything on the record however—their Lordships cannot of course go beyond that—leads them to the conclusion that, the appellant's adoption apart, the ultimate claim of Bhagwan's infant son to the Raj was, if he survived his father, such that it was nothing less than a counsel of prudence for the respondent, with the consent of Bhagwan obtained, to effect for herself and for the appellant a settlement so highly beneficial as, *rebus sic stantibus*, this was. For the allegations of fraud, undue influence, collusion and the like charged against the respondent and Bhagwan in connexion with these deeds, their Lordships can find in the record no justification whatever, and they deplore, in relation to these charges, what they will have to animadvert upon at a later stage in relation to other matters that the appellant should persist in them when he neglected or refused to tender himself as a witness to support them on oath.

The appellant took full benefit of the deed of gift. Mutation of names was effected in his favour: to give the deed full effect he retransferred to Lal Bishunath Saran Singh, the infant child of Bhagwan, the village by the deed assigned for his maintenance describing himself in his deposition as "son of Parmeshur Baksh Singh", then being resident at and Talukdar of Kutari, all in strange contradiction, as will presently be seen, to the assertions which in this suit he has made, with reference to his adoption by Raja Partab and that the estate had been outside the Act of 1869 ever since the year 1885 on the succession of the Raja Partab following the death of Rani Harnath Kuar. The appellant paid to the respondent maintenance under the deed of gift to the extent of Rs. 700 for the year 1926 but he made no further payments for that year nor any at all for the years 1927 or 1928. There was a quarrel between him and the

respondent and he separated himself from her in 1928. On 2nd April 1929, as already stated, her suit was commenced against him claiming these arrears. Their Lordships now approach the two main answers already mentioned made by the appellant to that claim. They are thus set forth in para. 21 of his written statement:

> Raja Partab Bahadur Singh in his lifetime, after performing religious ceremonies installed the defendant on the *gaddi* and under the deed of will, dated 28th June 1918, declared the defendant as his heir.

The Chief Court in its judgment, and with good reason, points out that in this paragraph the appellant does not particularize any definite date or even any definite year for the alleged adoption. Nor was it until 15th July 1930, some 15 months later, that any specification of its date was made: and even then, nothing more definite than that the appellant was adopted 14 or 15 years before. This reticence is of real significance when the divergent character of the oral evidence supporting the adoption, particularly in relation to the date of the event, falls to be considered. The form of the plea, however, indicates clearly enough and it turned out to be the fact, that there was neither deed nor registration of the alleged adoption forthcoming. It followed that if the Kutari estate had at its date been subject to the Act of 1869, its non-registration would have been fatal to its validity even if the ceremony of adoption had in fact been sufficiently proved. Nor in the same event even if its execution had been sufficiently proved, would the alleged will of the Raja have stood the appellant in better case, for, it too, had not been registered. Hence arose, as already indicated, the disputation with reference to the title of the Rani Harnath Kuar to the estate under the will of Raja Sarnam. If it could be shown that the Rani's interest thereunder was absolute, the appellant, as will presently be seen, would have taken one step towards establishing the fact essential to his case, that at the date of the unregistered adoption which he was setting up, the estate had ceased to be under the Act. And herein lies the significance of the decision of both Courts already recorded, that the Rani Harnath Kuar under the Raja Sarnam's will took in the estate an absolute interest. As they have said their Lordships were not asked to review that finding. In accepting it, as they must, they remember also the will's concluding words already cited, which formed in their belief, as they have stated, the foundation of Raja Partab Bahadur Singh's accession to the Raj.

Based however on the finding that the interest of the Rani Harnath Kuar in the estate was absolute, the further case of the appellant may be paraphrased as follows: The Rani had died intestate entitled to an absolute interest in the Raj. The estate at her death still remained subject to the Act—so much had now to be conceded—but thereunder, it devolved on her own heirs in accordance with S. 22. She was in fact survived by two brothers, Beni Singh and Fateh Singh. The elder of these was her rightful heir. Both brothers had left descendants. So long as any one of their line survived, the collaterals of the Raja Sarnam Singh were excluded from succession. Partab's claim to the estate was only as a collateral of Raja Sarnam Singh. Accordingly he did not inherit the estate. He was no better than a trespasser. By getting possession he broke the fetters imposed by the Act and the estate thereupon went out of the Act. His possession was ab initio adverse to the rightful heir, the brother of the Rani, and his descendants, and had ripened into ownership merely by limitation. Both Courts took that view. Partab Bahadur Singh, the learned Judges of the Chief Court say

> acquired a title by adverse possession extending over a total period of 32 years. It follows from our view that the estate in the hands of Partab Bahadur Singh was not governed by the provisions of the Oudh Estates Act.

Upon the question how far that conclusion calls for modification by reason of the last clause in the Raja's will, and by reason of the assumption on all hands at the time, that a declaration by the Rani Harnath Kuar in favour of Partab Bahadur Singh had been really made, the learned Subordinate Judge, treating the deed of 16th April 1886, mentioned in the replication as being the only place where as alleged the declaration was to be found, thought it enough to say that the existence of that deed had not been proved. As to the Chief Court, its answer is found in a passage in the judgment in which, after describing the statement of the Rani's action contained in the application of 6th June 1886, and in the deed of relinquishment of 8th June 1886, as amounting to "some suggestion that she nominated Partab Bahadur Singh as her heir", the learned Judges continue:

There is nothing however outside the contents of those two documents to show that Rani Harnath Kuar ever nominated Partab Bahadur Singh as her successor and the learned Subordinate Judge found it not proved that she did so. In any case she could not as a Talukdar orally appoint Partab Bahadur Singh as her heir having regard to the provisions of S. 13, Oudh Estates Act (1 of 1869). No oral appointment by Rani Harnath Kuar of Partab Bahadur Singh as her heir is therefore proved, nor if it were proved would it have been valid.

To their Lordships, this treatment by the learned Judges of a very difficult point is inadequate. No reference is made, it will be noticed, to the express words with which the will of the Raja concludes—it almost seems that these words were not brought to the learned Judges' attention—nor is any regard had to the presumption, justifiable perhaps at this distance of time, that the action attributed to the Rani and accepted and acted upon at every hand, was based upon fact. No question is raised as to any invalidity in the power conferred by the will ; nor is any reference made to the possibility, it may be no more, that it was owing to this action of the Rani that no claim to the estate was either then or since made by her brothers or either of them, or their respective descendants. If the statement that Partab Bahadur Singh —a boy of 14—took possession as a trespasser is intended to be a finding that he consciously did so, and that with his title of Raja recognized by Government and with constant official recognition of his position as Talukdar for 33 years he did not believe himself in relation to his estate to be subject to the Act throughout—then in their Lordships' judgment there is no justification in the evidence for such a finding. And even if it be true that the possession of Partab Bahadur Singh was in law originally, albeit unconsciously, possession without title, no consideration has been given to the further question whether the estate, throughout treated both by Government and by the Raja as being under the Act, was not, if ever outside the Act, brought back within it when after 12 years possession a complete title to the estate had by limitation been acquired. It was assumed on all sides that the estate was under the Act when many years later mutation was effected in favour of the respondent : it is apparently so assumed now when the appellant is styled Raja. It then may fairly be asked, if the estate was ever beyond the Act—when did it again become subject to it ? This change must have taken place, if at all, long before the alleged adoption. Their Lordships feel that these are very pertinent questions which demand an answer before it can be decided that the alleged adoption of the appellant, unregistered as it is, could, even if otherwise proved, be held to have any effect, and no regard to any such questions has been paid by either Court in India.

But their Lordships do not find it necessary to answer them. They will not treat the adoption as void merely because of non-registration. But they will regard the fact that the alleged adoption was not registered as a fact entitled to great weight in the consideration of the question whether the adoption ever took place at all. Raja Partab Bahadur Singh must in their judgment have at least believed that no adoption by him, unregistered, could have any validity whatever. To impose upon him an unregistered adoption, except on the clearest evidence of the fact that it took place, might work a grave injustice.

This leads their Lordships now to consider whether the appellant has proved as a fact that he was ever adopted by the Raja Partab Bahadur Singh. Very many witnesses were called ; very many documents are in evidence ; their Lordships have reinvestigated the whole question with care, and in the result, approaching the question as they feel it should be approached, they are satisfied that no other conclusion is open to them than in agreement with the Chief Court, to say that the adoption has not been proved. The learned Judges of the Court have tabulated the facts with infinite care and their conclusions based upon them are in their Lordships' judgment irresistible. No useful purpose would be served by their Lordships going over the same ground again. Very particularly are they impressed by the fact that an adoption now alleged to have been so conspicuous was never known to nor suspected by Government and by the acts on the appellant's part almost without number which, on the face of them, entirely negative any idea that he had become or believed that he had become the adopted son of the Raja. The respondent, for instance, swore that she and not he performed the sapinda for the Raja: and that he the appellant performed the sapinda for his natural father who died, it will be remembered, in the life-time of the Raja Partab, and a year after the date now fixed for the alleged adoption of the appellant by him. Very

striking also is it that so far as the evidence goes, the books of the Raj contain no entry of the expenses of the alleged adoption although witnesses for the appellant made the existence of these alleged entries the strong point in their evidence.

If the appellant had confidence in this part of his case, it is difficult to understand why, when proof of that fact had entirely failed, he did not insist upon production of all the Raj books for more careful inspection. But this method of conducting the appellant's case is characteristic. Their Lordships have already alluded to the failure on his own part to support by his own evidence his allegations of fraud and undue influence in relation to the deed of gift. Equally notable is his absence from the witness-box—quite deliberate as is shown by the record—in relation both to his alleged adoption and to the will of Partab Bahadur Singh which he propounded in the circumstances presently to be referred to. The case against adoption, judged merely by his own conduct at every stage, is almost overwhelming. He has elected to leave that conduct of his entirely without explanation. If his failure to give evidence was attributable to a reluctance to testify shared with many Indians of high caste, that is unfortunate, because in the present case his failure to testify has strained judicial credulity to breaking point.

The absence of the appellant from the witness-box in this suit leads to inferences as to the honesty of his case which, of themselves, are well nigh fatal to the possibility of its success. So manifold are the facts, which required explanation, that the judicial inference is almost irresistible that his case is not, and, in any of its three parts—the fraud of the respondent in relation to the deed of gift, the alleged adoption, and the alleged will of Partab—has never been an honest case. The only answer of substance to this view is that it involves, so it is said, a finding of deliberate perjury on the part of some witnesses of high position, who amongst a cloud of unconvincing testimony deposed to the ceremony of adoption, with apparently no interested purpose of their own to serve.

Their Lordships might have taken a different view of this aspect of the case, had the evidence against adoption been less overwhelming than it is. They do not forget the ruling of this Board in 14 M I A 346.[1] But with that opposing evidence standing they are led to discount the affirmative evidence of the witnesses referred to without thereby imputing to them deliberate perjury. They remember a fact not alluded to in the judgments below, that the appellant who seems always to have been treated by the Raja Partab, as his heir, might easily be supposed by them, after a lapse of many years and with a little suggestion, to have been the subject on some occasion of a ceremony of adoption. But however this may be, their Lordships are clear in their conclusion that no adoption has, in fact, been proved. Nor has the will of Partab Bahadur Singh propounded by the appellant been proved, as their Lordships think, to be the will of the Raja. The will itself is a strange document. Beginning with a statement by the testator —then only 47—that he had no son nor was there then any hope that he would have one, it proceeds :

"I have adopted out of my own will Lal Durga Bakhsh Singh, son of Babu Parmeshur Bakhsh Singh, who is my own nephew and do hereby make a will in writing in favour of the said Lal Durga Bakhsh Singh in respect of the whole property moveable and immovable and the entire Kutari Estate. . . ." (The testator goes on somewhat inconsequentially) "and I further agree that if perchance a son is born to me then he shall be the owner of the estate and shall get all rights, that if no son be born to me then after my death as long as Lal Durga Bakhsh Singh remains minor, Rani Brij Raj Kuar shall be the manager of the estate, that when Lal Durga Bakhsh Singh attains majority the said Rani Brij Raj Kuar shall get mutation of names effected in his favour, that Lal Durga Bakhsh Singh himself shall have the power to get mutation of names effected in his name in respect of the entire taluka and other property and that Lal Durga Bakhsh Singh shall pay maintenance allowance to Rani Brij Raj Kuar till her life according to her status".

By the respondent, it is pointed out with reference to this will, that almost, if not entirely *otiose*, had there been an adoption, it might be useful to prove even an undated adoption under the testator's own hand and be useful also to explain, had there been an adoption, the action of the respondent in obtaining mutation in her own name and in assuming management of the estate after the Raja's death, a course of procedure on her part which was taken, their Lordships are on the evidence satisfied, in the circumstances already described and with no reference whatever to the appellant or to this will of which the

1. Ramamani Ammal v. Kulanthai Natchear, (1870-72) 14 M I A 346=17 W R 1=2 Sar 736=2 Suther 493 (P C).

respondent, as she swore in evidence, had never heard. In these circumstances the clearest evidence of the genuineness of the will was called for from the appellant and on that issue, his case was, at best a poor one. The evidence that the signature of the testator is genuine is their Lordships think, as good or as bad as is the evidence that it is a forgery. More serious is it that although two out of the four attesting witnesses to the will are still alive, one only, and he a person whose association herewith with the will was strangely fortuitous, was put into the box. The other upon whose integrity doubt was cast by the respondent was not called, although subpœnaed by the appellant. The answer that he was also subpœnaed by the respondent and not called by her is surely no answer. The burden of proof was on the appellant. But, most serious of all, this will, of which the respondent, as she swore, had never heard, was not produced until 29th October 1929. The witness D. W. 36 who testified to its discovery said that in February 1927 he was told by the appellant to find the will and the horoscope in the muniment room of the Raj and that on searching he did find them there. On that it was essential for the appellant to explain how he knew of the existence of a will of which, so far as the record goes, (if the general evidence on this point of the appellant's father-in-law is discounted, as it may well be), no one else had ever previously even heard.

It was recognized by learned counsel for the appellant that if his appeal failed on the two questions dealt with in this judgment, it was not to his interest further to contest the decree of the Chief Court. In other words it is better for him on that footing that the deed of gift should remain binding upon him. On the whole case therefore, their Lordships are of opinion that the appeal entirely fails and that it should be dismissed with costs. And their Lordships have so humbly advised His Majesty.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondent—*Nehra & Co.*

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* A. I. R. 1938 Privy Council 49

(*From Patna*)

26th November 1937

LORD WRIGHT, SIR GEORGE LOWNDES AND SIR GEORGE RANKIN.

Raja Braja Sunder Deb — Appellant.

v.

Raja Rajendra Narayan Bhanj Deo — Respondent.

Privy Council Appeal No. 32 of 1936, Patna Appeal No. 32 of 1935.

*** Bengal Court of Wards Act (9 of 1879), S. 51—Court of Wards taking charge of property pending suit against proprietor—Suit must be amended so as to produce result set forth in S. 51, by making manager guardian of proprietor—Proper formal order to that effect is necessary—If proper parties are on record and are dealt with on correct footing, mere want of formality will not make void compromise between parties and decree of Court based on it.**

Whether a suit is brought before or after the Court of Wards has assumed charge of the property of a disqualified proprietor, the Court of Ward's manager or the Collector should be made guardian and must represent the ward in the suit. If an amendment is required owing to the Court of Wards taking charge pending the suit, the amendment must produce the result set forth in S. 51. The suit against the proprietor becomes defective upon his becoming a ward of the Court of Wards and the suit is to be reconstituted to satisfy S. 51. A proper formal order to that effect should always be made, but if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void the bargain of the parties and the decree of the Court. [P 52 C 1]

Where therefore in a suit against the proprietor the Manager, Court of Wards, is added as an additional defendant, on the Manager having assumed charge of the property, and a compromise is arrived between the parties, the validity of the compromise depends entirely upon whether the Court of Wards consented on behalf of the proprietor. If they did, the absence of a formal order making the Manager guardian ad litem as distinct from an additional defendant does not invalidate the decree. [P 52 C 1]

W. Wallach — *for Appellant.*

A. M. Dunne and J. M. Pringle — *for Respondent.*

Sir George Rankin.—The appellant and respondent are each possessed of an estate in the District of Cuttack in Orissa. These estates are situated on opposite banks of the river Kharsua—the appellant's estate of Aul being on the southern or right bank and the respondent's estate of Kanika on the northern or left bank. The dispute between the parties is as to the ownership of an island chur which by 1913 had formed in the bed of the river at a spot

between the appellant's mauza of Ekmania and the respondent's mauza of Patarpur. The chur is about 70 acres in extent. The appellant on 19th November 1928, sued the respondent in the Court of the Subordinate Judge of Cuttack claiming title not only to the chur but also to 48 acres of the river. The trial Judge by his decree dated 9th July 1930, found for the appellant as to 19·51 acres of the chur and 24 acres of the river. The respondent's appeal to the High Court at Patna was limited to the 19·51 acres of the chur. On 5th January 1934, the High Court allowed the respondent's appeal and dismissed the entire claim of the appellant in respect of the chur. There were certain cross-objections by the appellant which were dismissed.

The chur by 1915 or 1916 became fit for cultivation to some extent, and in 1917 the appellant and respondent were both claiming to be in possession of it. Proceedings under S. 145, Criminal P. C., resulted, on 6th March 1917, in an order by the Subdivisional Magistrate declaring the appellant to be in possession. The respondent on 28th February 1920, filed a suit (No. 67 of 1920) in the Court of the Subordinate Judge at Cuttack claiming sole right to the chur and possession thereof. The appellant was the sole defendant to this suit as originally brought. The appellant, on 18th March 1921, made an application under S. 6 (e), Court of Wards Act, 1879 (Bengal Act 9 of 1879) asking that he be declared to be disqualified to manage his own property and that the Court of Wards should take charge thereof. Possession was taken by the Court of Wards thereunder on 16th June 1921, but in the meantime, the respondent on 23rd May 1921, applied as plaintiff in Suit No. 67 of 1920 to have the Court of Wards' Manager, Babu Padma Charan Das, appointed guardian ad litem of the appellant. This application was dealt with by the Subordinate Judge on 2nd June 1921. It was objected on behalf of the appellant that the Court of Wards had not yet taken possession of the appellant's estate. In view of this, the Subordinate Judge directed that the Manager be added as an additional defendant to the suit. The cause title was amended by inserting as defendant 2 "Babu Padma Charan Das, Court of Wards' Manager" without any other amendment being made in the plaint.

On 21st June 1921—a few days after the Court of Wards had taken possession of his estate—the appellant brought in the same Court a suit (No. 134 of 1921) against Babu Padma Charan Das, Mr. H. D. Van Griecken (the Subdivisional Magistrate) and Mr. H. K. Briscoe (the Collector). In this suit—to which the respondent was not a party—the appellant sought (among other reliefs) a declaration that his letter of 18th March 1921, asking that he be declared a disqualified proprietor, had been obtained from him by undue influence and that he was under no obligation to make over his estate to the Court of Wards. On 10th July 1922, the appellant filed a petition withdrawing this suit. The Court of Wards was in fact in possession of the appellant's estate from 16th June 1921, until 16th June 1926, when it was released to the appellant.

The appellant's explanation of his varying attitude towards the Court of Wards is that his original application in March 1921, to be treated as a disqualified proprietor, was due not to financial embarrassment but to the fact there were pending against him a number of criminal prosecutions, and that these were withdrawn in April 1921, as a result of his having made the application. It is in evidence that when in June 1921 the Court of Wards took charge of the appellant's property, a quantity of arms were found thereon, and a criminal charge under the Arms Act was brought against the appellant in respect thereof. The appellant now seeks to explain his withdrawal on 10th July 1922, of his suit against the manager and the district officers, by saying that he did so to obtain withdrawal of this prosecution which in fact was shortly afterwards withdrawn. These explanations, even if they be accepted, do not now enable the appellant to dispute that for five years from 16th June 1921 the Court of Wards was in fact and in law in charge of his estate he being their ward and a disqualified proprietor. On 22nd December 1922 a petition was presented to the Court in the respondent's Suit No. 67 of 1920. Its heading and contents were as follows :

Raja Rajendra Narayan Bhunj Deo *Plaintiff.*

versus

Raja Brajasunder Deb, a Ward of Court by his next friend and guardian Padma Charn Das, Manager, under the Court of Wards ... ... *Defendant.*

The humble petition of the above-named plaintiff and defendant respectfully showeth :

That after the institution of this suit the original defendant's estate has been taken over by the Court of Wards in its charge, and the Manager under the Court of Wards has been substituted as guardian for the suit.

That all the civil suits pending between the plaintiff and the defendant having been agreed to be settled out of Court and the land in dispute in this suit which is a bit of chur land within the river Kharsua being situated nearer to the boundary of Kanika, and the intervening water channel being fordable from the Kanika side and not from Aul, the parties agree that plaintiff should get a decree in this suit for the land claimed without costs. The plaintiff gives up his claim to mesne profits and damages and the parties pray that the suit may be disposed of accordingly.

It appears that there were pending between the appellant and respondent a number of suits and applications and that a general settlement of them all had been come to. The petition in Suit No. 67 was only one out of a number of such petitions presented in different suits. It was signed by Mr. Das Gupta, the Government Pleader, whose duty it was to advise the Court of Wards, and by the pleader for the present respondent. It was signed on the following day by Mr. P. C. Das, the Manager. The Subordinate Judge decreed the suit in terms of the compromise and a formal decree bearing date 22nd December 1922 was drawn up. In that decree the names of the appellant and of "Babu Padma Charan Das, Court of Wards' Manager" were given as defendants 1 and 2 and the decree follows the terms of the petition verbatim, including the statement that "the manager under the Court of Wards has been substituted as guardian for the suit." In execution of this decree possession was, on 30th March 1923, obtained by the respondent, who was still in possession on 19th November 1928, when the present suit was brought by the appellant.

In reviving his claim to the chur lands in suit, the appellant had necessarily to get the compromise decree of 22nd December 1922 set aside as not binding upon him. By his plaint he sought to obtain this relief by charging the manager, Mr. P. C. Das, and the respondent, with fraud in the matter of the compromise. He alleged that the manager held land under the respondent and was under obligation to the respondent in other ways : that the respondent took advantage of his influence over the manager; that fraudulent reports in favour of the compromise were submitted to the Board of Revenue whose sanction was obtained by misrepresentation of facts. At the trial the Subordinate Judge accepted this case holding that the compromise decree was "tainted with fraud and misrepresentation." This conclusion the High Court on appeal thought to be "without any basis and altogether unjustifiable." Their Lordships have no difficulty in upholding the decision of the High Court upon this issue. There was no evidence of any fraudulent reports or of any misrepresentation by the manager : the compromise was negotiated at the Collector's suggestion, provisional terms being obtained from the respondent and elaborately examined by the Collector and the Commissioner with the advice and assistance of the Government Pleader. The terms were only accepted after certain alterations had been agreed to, though the alterations did not refer to the particular chur now in question. The manager's father had held land under the respondent, but there was no other basis for the suggestion that the manager was under obligation to the respondent or under his influence. Upon the merits of the compromise the burden lay heavy on the appellant to show the precise effect of the complete bargain and its unfairness when taken as a whole. The trial Judge did not properly appreciate this : as the appellant's claim to this chur was given up he thought the respondent had to show that there was due compensation in respect of the other cases. Their Lordships hold with the High Court that the compromise was made in good faith and was in the interest of the Aul estate.

In these circumstances learned counsel for the appellant has sought before their Lordships to maintain this appeal upon a point which was not taken at the trial but was raised for the first time in argument before the High Court. This is a technical point and depends entirely upon the form of the order made on 2nd June 1921 in Suit No. 67 of 1920. It is said that because the Court of Wards Manager, Mr. P. C. Das, was made an additional defendant and not made guardian ad litem of the appellant, the appellant can contend that the compromise decree in that suit is not binding upon him unless it be shown that he consented to it. It appears that letters written to him about the proposed compromise on behalf of the Court of Wards were returned as the appellant refused to receive them, but he can hardly expect credence for a suggestion that he

did not soon come to know of the compromise as to the island in the Kharsua and all other matters between him and the respondent. If he were an independent party entitled as defendant 1 to act on his own behalf, he could not stand by from 1921 till November 1928, and then repudiate the compromise; nor could he repudiate it as regards the chur now in suit without repudiating it as a whole. In fact and in law however his position in December 1922 was that he was a disqualified proprietor : without the Court of Wards upon the record the suit as against him was defective : strictly and formally his consent was not necessary and his dissent mattered nothing. The validity of the compromise depends entirely upon whether the Court of Wards consented on his behalf. If they did, the absence of a formal order making their manager guardian ad litem as distinct from an additional defendant does not invalidate the decree. If it be taken that the recitals in the decree itself did not make the manager guardian for the appellant, still they recognized his authority as such. Whether a suit be brought before or after the Court of Wards has assumed charge of the property of a disqualified proprietor, the Court of Wards' manager or the Collector should be made guardian and must represent the ward in the suit. It is impossible to suppose that the ultimate constitution of the suit is to be different according to the date of institution. If an amendment is required owing to the Court of Wards taking charge pending suit, the amendment must produce the result set forth in S. 51 of the Act. Whether to such a case the machinery of R. 10 of O. 21, Civil P. C., applies is arguable, but the suit as against the proprietor becomes defective upon his becoming a ward of the Court of Wards, and the suit should be reconstituted to satisfy S. 51. A proper formal order to that effect should always be made, but if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void the bargain of the parties and the decree of the Court. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

Solicitors for Appellant —

Hy. S. L. Polak & Co.

Solicitors for Respondent —

A. J. Hunter & Co.

*** * A. I. R. 1938 Privy Council 52**

(*From Madras : A I R 1935 Mad 936*)

3rd December 1937

LORD WRIGHT, SIR GEORGE LOWNDES AND SIR GEORGE RANKIN.

Mercantile Bank of India Ltd. — Appellants.

v.

Central Bank of India Ltd. — Respondents.

Privy Council Appeal No. 54 of 1936.

*** (a) Pledge—Pledge of railway receipts—Pledge operates as pledge of goods—Pledgee does not lose his rights as pledgee by temporarily handing over receipts to pledger for collecting goods from Port Trust and putting them into pledgee's godowns.**

A railway receipt is a document of title and a pledge of the railway receipt operates as a pledge of the goods, though by the general law a pledge of documents is not prima facie deemed to be a pledge of the goods. The pledgee does not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledger or his agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the pledgee's godowns. Such a procedure is the usual course of business and is either necessary or at least convenient for the conduct of the business : *A I R 1934 P C 246, Foll.* [P 54 C 1]

*** * (b) Estoppel — Estoppel by conduct, neglect or representation discussed—Bank *A* advancing loans to merchant on pledge of railway receipts — Following usual practice, receipts handed over back to merchant for collecting goods from Port Trust and storing them in bank's godowns—Merchant fraudulently pledging same receipts to bank *B* and obtaining second advance—Suit by *A* against *B* for conversion—Plea of estoppel by representation held could not be relied on by *B* against *A*—Law under S. 115, Evidence Act is same as English law.**

The law of estoppel which S. 115, Evidence Act enacts is the same as the English law : *30 Cal 296 (P C), Rel. on.* [P 58 C 2 ; P 59 C 1]

Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess, is described as estoppel by negligence or by conduct or by representation or by holding out of ostensible authority. Such estoppel is based on the existence of duty which the person estopped is owing to the person led into wrong belief or to the general public of whom the person is one. There is a breach of duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negli-

gence, representation or ostensible authority : *English case law reviewed.* [P 55 C 2 ; P 56 C 2 ; P 58 C 2]

Bank *A* advanced loans to a merchant on the pledge of railway receipts. Following the usual practice, the railway receipts were handed over back to the merchant for the specific purpose of clearing goods represented by the railway receipts from the Port Trust and storing them in the bank's godowns. The bank did not put its stamps on the railway receipts. The merchant fraudulently pledged the same railway receipts to bank *B* and obtained a second advance. Thereupon bank *A* brought against bank *B* an action for conversion. Bank *B* raised a plea of estoppel against bank *A* :

Held that the plea of estoppel could not be availed of. Bank *A* did not owe any duty to bank *B* in the matter. There was no relationship of contract or agency. There was also no representation by bank *A* which had no reason to think that it was representing to anybody that the merchant had any title to dispose of the goods. The railway receipts were not dangerous things ; there was no question of arming the merchant with them. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was at the best an ambiguous document. Its possession no more conveyed a representation that the merchant was entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It was not like a negotiable instrument. The document on its face conveyed no representation when presented that the merchant was invested with full disposing power. It was not indeed true to say without qualification that people were not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. Bank *A* therefore was entitled to rely on the rule of law that no one could pass a better title than he possessed :

[P 55 C 1, 2 ; P 57 C 1, 2 ; P 58 C 1]

Held further that the failure to place its stamps would make no difference. It was not the practice nor duty as between the two banks to adopt such a practice. [P 58 C 2]

(c) Banker and Customer — Negligence of customer in mode of drawing cheque—Liability of customer—What must be shown stated. (*Obiter*).

Even if there is a duty as between the banker and the customer in drawing a cheque in a proper mode, it must be shown, in order to hold the customer liable for negligence in drawing cheques, that there was a breach of the duty by the neglect of some usual and proper precaution : (*1918*) *A C 777, Rel. on.* [P 57 C 1, 2]

(d) Contract—Stock Exchange transactions —Broker is assumed to have full authority to deal with securities in his custody (*Obiter*).

Stock-brokers in the ordinary course of business are employed to sell, to buy and to raise money upon as well as to keep in custody the securities of their customers and accordingly it is a reasonable assumption that the broker has full authority to deal with the securities : (*1892*) *A C 201, Rel. on.* [P 58 C 1]

A. T. Miller and C. P. Harvey — *for Appellants.*

Sir Stafford Cripps and W. Wallach — *for Respondents.*

Lord Wright.—The appellants and the respondents are limited companies carrying on the business of bankers in Madras. The appeal is against the judgment of the Appellate Court of Madras who have held the appellants liable to the respondents for the conversion of their property. The question arises out of a series of frauds committed by a firm of merchants named C. K. Narayana Iyer & Sons, who will be referred to hereinafter as "the merchants." They were a firm who, until the frauds became disclosed, had enjoyed the highest standing and repute in Madras where they carried on a large business as buyers and exporters of ground-nuts. Their practice was to purchase the ground-nuts from the up-country growers and have them despatched by rail to Madras. The railway companies and the Madras Port Trust, which had its own railway system within the Port, had a working arrangement between them under which the Trust took over the consignment of nuts on their arrival at the Port and lodged them in the first instance in their godowns. The ground nuts were covered in respect of each consignment or wagon load by a document called a "railway receipt," which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in question in these proceedings, the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination should be evidence of complete delivery. They also provided that if the consignee did not himself attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wished it to be made.

Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts ; the practice was that the merchants should

deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their own godown keeper so as to enable him to obtain possession of the goods. What was in practice then done was for the bank's godown keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants, but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's godown. The character and effect of this course of business was discussed by the Board in (1935) A C 53.[1] It was there held that the railway receipt was a document of title within the meaning of S. 178, Contract Act, 1872, and that a pledge of the railway receipt operated under that section, which was in force at material times but has since been repealed, as a pledge of the goods, though by the general law a pledge of documents is not prima facie deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the bank's godown. It was said by the Board that such a procedure was in the usual course of business and was obviously either necessary or at least convenient for the conduct of the business.

The railway receipts concerned in this case were 35 in number. The merchants, in accordance with the practice and for the purpose described above, were given by the respondents the receipts and they fraudulently obtained a second advance from the appellants. It was found that in January and February 1929 the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway receipts from either the appellants or the respondents, as the case might be, they repledged them with the other bank, that is to say, if the railway receipts had been pledged in the first instance with the appellants they took them to the respondents and obtained advances on them as if they had not been already pledged, and conversely, if they had been first pledged with the respondents they took them to the appellants and obtained advances from them. There was however one difference between the two banks, in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge. That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations. The addition of the stamp had no effect in law and was not, it seems, generally adopted by banks, but it would naturally, according to the evidence, put the other bank on inquiry. The merchants however were not unequal to dealing with this complication. They followed the simple process of obtaining delivery of the goods if the railway receipts bore the bank's stamp and thereupon pledging the goods themselves with the other bank. It was rightly not contested that such a pledge of the actual goods was invalid. In due course the frauds became known and the merchants were declared insolvent. Thereupon the respondents brought against the appellants an action for conversion out of which the present appeal arises. It was found by the trial Judge, and is not now contested, that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts, did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants. This followed from S. 178, Contract Act, 1872, as interpreted in (1935) A C 53.[1] This section, in force at material times, though since repealed, is in the following terms:

> 178. A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents; Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

It has been found in the Courts below that the merchants obtained the documents or goods by means of an offence or

1. Official Assignee of Madras v. Mercantile Bank of India, (1934) 21 A I R P C 246=(1935) A C 53=152 I C 730=61 I A 416=58 Mad 181=104 L J P C 1=152 L T 170 (P C).

fraud within the meaning of the section, because the true inference from the facts was that they obtained the documents with no intention of fulfilling their duty as mandatories but with the dishonest intention of perpetrating the frauds which they actually committed. The correctness of that ruling was not challenged before the Board. The appellants however claimed that they were entitled to succeed in the action on the ground which is set out in their amended defence in the following paragraph:

> The plaintiff bank having placed C. K. N. & Sons in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein or that C K. N. & Sons were not the owners thereof, enabled C. K. N. & Sons to hold themselves out as the owners thereof and thereby to pledge the said railway receipts for value with the defendant bank, who acted in good faith, and the plaintiff bank is therefore estopped from setting up its title against that of the defendant bank to the relative goods or their value.

It has been this plea which has been the subject of debate in the present appeal. Both Courts below have decided against it. It is admitted that the respondents made the advances completely bona fide; they only did what they had done for some time previously without any misadventure. They had regularly had dealings with the merchants over a prolonged period. The merchants were a firm of the highest standing and reputation of whose rectitude and solvency there had been no question or suspicion. In delivering the railway receipts to the merchants the respondents followed a practice which had long been consistently followed both by the appellants and the respondents. No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose which has been stated. On these facts it would prima facie seem impossible to say that the respondents made any representation to the appellants that the merchants had authority or were entitled to obtain an advance on the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to anyone else. All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed both by the appellants and the respondents. It would seem accordingly, that they were entitled to rely on the rule of law that no one could transfer a better title than he possessed, save in the exceptional cases not here material, such as sales in market overt or where there has been a transfer of property avoidable on the ground of fraud but not yet avoided or where the special provisions of the Factors Acts apply. It has however been strenuously contended on behalf of the appellants that the circumstances here raise what is called an estoppel, and that the respondents are precluded by their conduct from denying as against the appellants that the merchants had the right, which they pretended to have, of pledging the goods as owners, the bona fides of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by Ashhurst J. in (1787) 2 Term Rep 63[2] at p. 70, that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." The decision of the Board in (1926) A C 72[3] was cited as one in which it was said that the case was a plain case for the application of that principle. The facts were that a grower of cocoa in the Gold Coast Colony had consigned by railway cocoa to a merchant at the port in the expectation of his buying the cocoa. The merchant, instead of concluding the purchase, purported to sell the cocoa as for himself to a third party, the appellants, who purchased in good faith and paid the full price to the merchant as

2. Lickbarrow v. Mason, (1787) 2 Term Rep 63=1 H Bl 357=6 East 21=1 R R 425.
3. Commonwealth Trust Co. v. Akotey, (1926) A C 72=94 L J P C 167=41 T L R 641=134 L T 33.

seller. In an action for conversion brought by the grower, the Full Court of the Gold Coast held that no property had passed because the merchant had no title. That judgment was reversed by this Board, who said that :

> To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow* v. *Mason*.[2]

What is there stated, it may be, would cover this case if it is applied without qualification. But in their Lordships' judgment it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report which would justify the decision, but on the face of it their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case in (1926) A C 670[4] at page 693, said :

> There was no duty between Jones, Ltd., and Waring & Gillow, Ltd., and without that, the wide proposition of Ashhurst J. in (1787) 2 Term Rep 63[2] would not apply [see observations of Lord Macnaghten and Lord Lindley in (1902) A C 325[5] and of Lord Parmoor in (1918) A C 777,[6] which were apparently overlooked in (1926) A C 72[3]].

Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord Parmoor's speech in (1918) A C 777,[6] pointed out that the rule expressed by Ashhurst J. was too wide and said that the accurate rule was stated by Blackburn J. in (1863) 2 H & C 175[7] at page 182. There Blackburn J. referring to the judgment in the Court below of Wilde B. said :

> He omits to qualify the rule he has stated by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.

To the same effect in (1902) A C 325[5] at page 342 Lord Lindley said :

> It is, of course, true that by employing Capon (the fraudulent clerk) and trusting him as they did, the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach.

Lord Lindley then pointed out that the dictum of Ashhurst J. is too wide. This has been pointed out by other Judges. It was indeed not necessary to the decision of the case which was before Ashhurst J. The case in (1926) A C 72[3] is also inconsistent with the case in (1878) 3 C P D 32,[8] where it was held that the conduct of the plaintiff in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who in good faith made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. In one sense the plaintiff by leaving the indicia of title in the vendor's hands had enabled him to defraud the defendants, but it was held by the Court of Appeal that, in the words of Cockburn C. J. :

> The case for the plaintiffs rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party however innocent in the transaction the latter party may have been.

The Chief Justice adds that if it were held that in such a case there was an estoppel, the Factors Acts, which give a limited protection in certain cases to the

4. Jones Limited v. Waring & Gillow Ltd., (1926) A C 670=95 L J K B 913=135 L T 549=32 Com Cas 8=70 S J 756=42 T L R 644.
5. Farquharson & Co. v. King & Co., (1902) A C 325=71 L J K B 667=86 L T 810=51 W R 94=18 T L R 665.
6. London Joint Stock Bank v. Macmillan, (1918) A C 777=88 L J K B 55=119 L T 387=23 Com Cas 415=62 S J 650=34 T L R 509.
7. Swan v. North British Australasian Co., (1863) 2 H & C 175=32 L J Ex 273=10 Jur (N S) 102=11 W R 862.
8. Johnson v. Credit Lyonnais, (1878) 3 C P D 32=47 L J C P 241=37 L T 657=26 W R 195.

unauthorized sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite.

Mr. Miller however argued that the necessity of a duty to constitute an estoppel only applied to an estoppel based on conduct or negligence, whereas an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation by the respondents to any person to whom the merchants might produce it, that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation when presented by the merchants to the respondents that the merchants were invested with full disposing power. No authority was cited which in their Lordships' judgment would justify any such wide proposition. It is not indeed true to say without qualification that people are not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. (1918) A C 777[6] is a case in which the bank's customer was held liable because he had facilitated the fraudulent alteration of a cheque by so drawing the cheque as to leave a space which the forger could fill up and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer and was distinguished on that ground from (1896) A C 514[9] where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of such proof that the case in (1932) 1 K B 544[10] was distinguished from the case in (1918) A C 777.[6] In the present case not only was there an absence both of any duty or of anything amounting to a neglect of usual precautions, but there was in their Lordships' judgment no ground for finding any representation. There was no reason for the respondents to think that they were representing to any body that the merchants had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established.

There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was (1895) 1 Q B 521[11] which was relied on by Mr. Miller. There was in that case an actual transfer of goods lying in a warehouse, to the order of Fletcher, a transfer made on the express instructions of the owner of the goods, who was induced to do so by Fletcher's fraud: Fletcher then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods to Fletcher's order. That was held to be a case where both the warehouseman and the owner were estopped from denying the rights of the purchaser. The warehouseman had in fact attorned to the purchaser and it was also held that there had been a holding out by the true owner of the goods that Fletcher was capable of giving a good title. That was a very different case from the present. A similar principle of holding out has been applied in the cases where a share certificate with a transfer in blank has been placed in the hands of a stockbroker or one in a similar position, and where it has been held that there was a representation which constituted an estoppel. Such a case is illustrated by (1914) 2 K B 168,[12] where

9. Scholfield v. Londesborough, (1896) A C 514=65 L J Q B 593=75 L T 254=45 W R 124.

10. Slingsby v. District Bank Ltd., (1932) 1 K B 544=101 L J K B 281=146 L T 377=37 Com Cas 39=48 T L R 114=41 Ll L Rep 138.

11. Henderson v. Williams, (1895) 1 Q B 521=64 L J Q B 308=14 R 375=72 L T 98=43 W R 274.

12. Fuller v. Glyn, Mills, Currie & Co., (1914) 2 K B 168=83 L J K B 764=110 L T 318=19 Com Cas 186=58 S J 235=30 T L R 162.

the plaintiff had left share certificates in the hands of stockbrokers, the certificates were in the name of a person from whom the plaintiffs had bought the shares and bore upon them an endorsed form of transfer executed by the seller. The stockbrokers used the certificates in order to obtain an advance for themselves. On their bankruptcy, the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it and if produced to a third person, calculated to convey to that third person that such an authority exists. On the facts of such a case there was in addition to the form of the document, the character of the person in whose hands it was. As was said in (1892) A C 201[13] at page 213 by Lord Watson :"brokers in the ordinary course of business are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers" and accordingly it was reasonable assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such cases further or express any opinion about them, because the material circumstances were not present here. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its possession no more conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been. It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them for his own purposes. Such cases are quite different.

Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railway receipts in regard to the transactions in question; it is true that at a later date the respondents did stamp the railway receipt and that the appellants in practice did so throughout, but it is clear in their Lordships' judgment, that that would have made no difference to the course adopted by the merchants. If the stamp had the effect of putting the bank on enquiry, the merchants would not adopt the method of seeking to obtain a second advance on the documents, but would have taken delivery under the receipt of the actual goods and pledged them, or if they did seek to obtain a second advance on the documents and had been asked by the bank to explain why the railway receipt was stamped, might have said that they had pledged the documents and redeemed that pledge. Having regard to the position which they held, that explanation would, presumably, have been accepted. There is however a more general answer to any argument based upon the respondents' failure to stamp. It is not suggested that it was a usual practice, so that failure to adopt it could be charged against the respondents, but even if it were, it would still be of no avail to the appellants because there was no duty as between the appellants and the respondents to adopt any such practice. As already pointed out, the existence of a duty is essential, and this is peculiarly so in the case of an omission. This is so even if the case were put on representation or holding out. The duty may be, in the words of Balckburn J., "to the general public of whom the person is one." There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. In their Lordships' judgment the appellants fail to establish these conditions.

Section 115, Evidence Act, does not call for particular discussion here. It is conceded that the law it enacts is the same

13. London Joint Stock Bank v. Simmons, (1892) A C 201=61 L J Ch 729=66 L T 625=41 W R 108=56 J P 644.

as the English law : *see* 19 I A 203[14] at p. 215. For these reasons their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellants —

E. F. Turner & Sons.

Solicitors for Respondents —

Hy. S. L. Polak & Co.

14. Sarat Chunder Dey v. Gopal Chunder Laha, (1893) 20 Cal 296=19 I A 203=6 Sar 224 (P C).

A. I. R. 1938 Privy Council 59

(*From Lahore*)

30th November 1937

LORD ALNESS, SIR GEORGE LOWNDES AND SIR GEORGE RANKIN.

Mahunt Shatrugan Das — Appellant.

v.

Bawa Sham Das and others —

Respondents.

Privy Council Appeal No. 126 of 1936.

Practice — Witness — Parties — Calling of defendant by plaintiff as his witness is condemnable—In such case defendant is witness of truth.

The practice of calling the defendant as a witness to give evidence on behalf of the plaintiff is condemnable. In such a case the plaintiff must be treated as a person who puts the defendant forward as a witness of truth. [P 60 C 2]

A. M. Dunne and S. Hyam —

for Appellant.

Respondents ex parte.

Sir George Rankin. — In this case the original plaintiff was one Mahabir Das, mahunt of a thakardwara at Peshawar and Chiniot. By his suit, brought on 3rd August 1926, in the Court of the Subordinate Judge at Sheikhupura in the Punjab, he claimed to eject defendant 1 Sham Das from a thakardwara situate at a village called Bhikhi and from the properties belonging thereto. On 22nd August 1927 he succeeded before the trial Judge in obtaining a decree declaring that Sham Das was a trespasser and that he (the plaintiff) was entitled to possession of the property attached to the Bhikhi temple. Thereafter he obtained possession in execution of the decree. The High Court at Lahore however on 27th June 1933 set aside this decree and dismissed the suit. While the appeal was pending in the High Court, viz. on 10th July 1930, Mahabir Das died and was succeeded on the gaddis of Peshawar and Chiniot by one Ram Lakhman Das. On an application made by Sham Das on 14th October 1930 the High Court substituted Ram Lakhman Das as plaintiff-respondent to the appeal—an order which is objected to before their Lordships on the ground that the application was four days out of time, that the appeal had abated on 10th October, and that no sufficient cause was shown under O. 22, R. 9 (2) for setting aside the abatement. On 18th January 1935 Ram Lakhman Das executed a deed of relinquishment whereby he relinquished his various gaddis including that of Bhikhi to the present appellant, mahunt Shatrugan Das, and authorized him to prosecute this appeal to His Majesty.

The institution at Bhikhi, which is the subject of dispute, is admittedly a thakardwara of the Bairagis of Rama Nand. It goes by the name of one Bawa Prahlad Bhagat Sahib as its founder. Before Sham Das attained the gaddi in 1923, the mahunt was one Dharm Das, said by both parties to have been a descendant of Prahlad Bhagat. Dharm Das died on 25th June 1923, but he had been long afflicted with insanity. It seems now to be clear, though it was at one time disputed by the plaintiff, that Dharm Das had a chela called Dial Das who acted as mahunt during the absence and incapacity of Dharm Das. Dial Das however predeceased Dharm Das, and on the latter's death Sham Das, defendant 1 claiming to be chela of Dial Das, applied to the Revenue Court for mutation and obtained mutation on 2nd November 1924. Sham Das is admittedly a ghrihisti or householder, having been married twice, though he is now apparently a widower. According to the plaintiff's case, Sham Das cannot lawfully succeed to the gaddi as only an ascetic (verkatta bairagi) can be mahunt of Bhikhi. The plaintiff's case as pleaded by his amended plaint is anything but clear. The defendants number 26: of these 20 seem to be tenants of land belonging to the Bhikhi institution and five are mahunts of other bairagi thakardwaras. The suit is framed in ejectment and asks a declaration negativing the right of Sham Das. One relief claimed is:

(d) I may be accepted as lawful mahunt with full powers in place of defendant 1, and possession of moveable and immovable property . . . may be awarded to me from him.

On the footing that Mahabir, the original plaintiff, was the true and lawful mahunt of Bhikhi, the suit is simply one wherein he is claiming possession of his own property. But if this ground has to be abandoned, it is not, in their Lordships' view, possible to alter the character of the suit so as to regard it as one brought by a person interested in the institution to obtain due administration thereof and the appointment of a proper mahunt. It does not appear that the plaintiff is on this hypothesis a person interested in the Bhikhi institution. He is not one of its sewaks nor a resident of Bhikhi. Moreover, according to the plaintiff's case, the institution would seem to be a public charity so as to attract the provisions of S. 92 of the Code. What then is the case made by the plaintiff to show that he is entitled to possession of the Bhikhi temple? He must succeed on the strength of his own title.

According to the plaint Prahlad Bhagat was one of a number of disciples of a sadhu called Lalji, who founded a bhek (council) of ascetic bairagis, and the Bhikhi temple is governed by a system according to which a mahunt can only nominate a chela to succeed him with the permission of the bhek, and if there is no such nomination the bhek can appoint any other gaddinashin to the vacant gaddi. On this footing the plaintiff's claim is that Dharm Das having died without a chela, "I, being one of the distinguished gaddinashins of the said bhek, have the right of succession on behalf of the bhek." So far, the title of the plaintiff to the office of mahunt of Bhikhi is difficult to discover. At the settlement of issues the plaintiff stated : "I have been authorized by the four big gaddis to bring this suit." Defendant 2 was Harnam Das, the mahunt of Dhianpur, who filed a written statement alleging that "the thakardwara at Bhikhi is under the Dhianpur gaddi" and stating that "the plaintiff brings the claim with the permission of this gaddi." The learned trial Judge held that the Bhikhi institution was not independent, as defendant 1 claimed, but was under the rule of Dhianpur and that it was for the mahunt of Dhianpur to appoint a successor to Dharm Das. The High Court have rightly been dissatisfied with this conclusion as it is not the case made by the plaint. Still less can the Court be asked to hold the plaintiff to have been duly installed as mahunt of Bhikhi by one Bhagwan Das as the legatee of the Dhianpur mahunt. Mahabir Das, the plaintiff, refrained from giving evidence on his own behalf. He adopted instead the tactics of calling Sham Das, defendant 1, as a witness for the plaintiff, with the usual result that important features of his case are denied by his own witness. Their Lordships have on previous occasions condemned this practice and approve of the course taken by the High Court in treating the plaintiff as a person who put defendant 1 forward as a witness of truth. Their conclusion upon the whole case is that the learned Judges of the High Court were right in being dissatisfied with the plaintiff's proof of the custom alleged by him to govern the Bhikhi temple and still more dissatisfied with the proof that it was controlled by the mahunt of Dhianpur. They think that the plaintiff's allegations as to custom are inconsistent and that there is no reliable evidence of the plaintiff's due appointment to the Bhikhi gaddi under any of the customs alleged. In the evidence as to custom, there is a noticeable lack of specific instances as distinct from mere swearing "by the card." At the root of the case is the question of fact whether Dial Das did not make Sham Das his chela. If so, the fact that Dial Das predeceased Dharm Das may put no difficulty in the way of Sham Das. On this fundamental point, the High Court accepted the latter's case and the witnesses called by him from among the sewaks of the temple and from the Bairagi community are difficult to discard. Their Lordships are in agreement with the High Court that the plaintiff's title to sue in ejectment has not been made out, and they find it unnecessary to enter upon the question of the qualifications of Sham Das to occupy the office of mahunt.

It is not shown that Sham Das might and should have known of the death of Mahabir before he did or that the High Court were in error in excusing him for the four days delay in making his application for substitution. Ram Lakhman Das waited from October 1930 to 12th June 1933, before objecting to the substitution : the hearing of the appeal began on 8th June 1933. There is no substance in the objection taken to the order setting aside the abatement. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the res-

pondents have not appeared there will be no order as to costs.

S.C./R.K. *Appeal dismissed.*

Solicitors for Appellant —

T. L. Wilson & Co.

Respondents ex parte.

A. I. R. 1938 Privy Council 61

(From Board of Revenue, B. & O.)

30th November 1937

LORD WRIGHT, SIR GEORGE LOWNDES AND SIR GEORGE RANKIN.

Raja Jagadish Chandra Deo Dhabal Deb — Appellant.

v.

Mirza Santal and others—Respondents.

Privy Council Appeal No. 38 of 1936.

(a) Privy Council—Appeal to—Administrative orders of Board of Revenue.

The resolutions or orders of the Board of Revenue which are rather of an administrative nature than judgments in the ordinary acceptance of the term may well appear not to be proper to be brought before the Board on appeal. [P 61 C 2]

(b) Land Tenure — Pradhan — Pradhani is characteristic of aboriginal tribes.

The headman or pradhani system is characteristic of the social organization of aboriginal tribes who established themselves in Chota Nagpur before the advent of the Hindus. [P 63 C 1]

(c) Land Tenure — Pradhan — Proof of custom.

In order to prove the custom of pradhani in a village, it is not necessary that the village must be an ancient one. It is sufficient if it is proved that the village which is of recent foundation was founded by members of the tribe who brought to its foundation their ancient custom of pradhani. [P 63 C 2 ; P 64 C 1]

(d) Chota Nagpur Tenancy Act (6 of 1908), S. 74-A—Vacancy created before existing at the time of enacting S. 74-A—S. 74-A applies.

If at the time when S. 74-A was enacted, there was a vacancy in connexion with the appointment of a village headman, S. 74-A applies, even though the vacancy may have been created before the section was enacted. [P 64 C 1]

(e) Chota Nagpur Tenancy Act (6 of 1908), Ss. 74-A and 231—S. 74-A does not deal with accruing of cause of action—It gives only right to invoke administrative operation—S. 231 is not applicable to applications under S. 74-A.

Section 74-A, according to ordinary interpretation, is not dealing with a cause of action at all. It does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary, the section makes the right of applying conditional on a state of facts namely where a tenancy has been vacated. While that condition exists, there is no ground for fixing on any specific moment of time. It presupposes that there is a custom requiring the appointment of a village headman and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear therefore more natural to say that as there is not in the strict sense a cause of action under S. 74-A but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants or both, S. 231 is incapable of application to an application under S. 74-A. [P 64 C 1,2]

A. M. Dunne and J. M. Pringle — *for Appellant.*

Respondents ex parte.

Lord Wright.—This appeal is brought by special leave of His Majesty in Council and raises questions of some difficulty and somewhat out of the ordinary course. It is an appeal from a resolution of the Board of Revenue of Bihar and Orissa, dated 10th November 1933, which confirmed an order of the Commissioner of Chota Nagpur, dated 11th June 1933 affirming on appeal the order of the Deputy Commissioner of Singbhum, dated 6th March 1933. As will appear later, these orders seem rather of an administrative nature than judgments in the ordinary acceptance of the term, and in that sense may well appear not to be proper to be brought before the Board. They have however now come before the Board; it may be because of the observations of the Board of Revenue that the question was difficult and that it was much to be desired that the law should be clarified. The Board will accordingly deal with the position as it now presents itself.

The question arises under the Chota Nagpur Tenancy Act (Bengal Act 6 of 1908) and in particular under a section later added to that Act, namely S. 74-A by an Amending Act of Bihar and Orissa, Act 6 of 1920. These two Acts will be referred to subsequently in this judgment as "the Act." The proceedings relate to a village called Lango which is situate in Taraf Atkosi of Perganna Dhalbhum. The district in which Lango is situated is part of a backward tract inhabited by certain tribes who are described as aboriginal and who have their own primitive traditions and customs. The dispute which arose was between the Raja of Dhalbhum, who is the appellant in this appeal, and certain inhabitants of the village. The respondents have not appeared. The case has been argued ex parte, but Mr. Dunne and

Mr. Pringle, for the appellant, have laid the whole position very fully before their Lordships, who also have the benefit of the very careful resolution of the Board of Revenue delivered by Mr. Dain. The question relates to the appointment of a village headman or pradhan for Lango. The appellant contends that in the facts of this case, no village headman should be appointed but that he is entitled to khas possession of the village properties. It will be convenient to refer to the relevant sections of the Act of which the most material section is S. 74.A which is in the following terms :

74-A.—(1) Where a tenancy which in accordance with custom is held by a village headman, has for any reason been vacated, any three or more tenants holding land within the said tenancy, or the landlord, may apply to the Deputy Commissioner to determine the person who in accordance with custom should be village headman entitled to hold the tenancy. (2) Such application may be made notwithstanding that a person is in possession of the land of the tenancy, or part thereof, under the authority or with the consent of the landlord. (3) On receiving such application, the Deputy Commissioner shall, after giving notice in the prescribed manner to the landlord, the person, if any, referred to in subs. (2), the heirs of the last village headman, the tenants and such other persons, if any, as he considers should be parties to the proceeding, make such inquiry as appears necessary, and determine the person who in accordance with custom should be village headman entitled to hold the tenancy, and shall place such person in possession of the tenancy, if such person is not already in possession thereof. (4) In every such inquiry, the Deputy Commissioner shall have regard to the entries in a record of rights finally published under this Act or under any law in force before the commencement of this Act, and to the suitability of a person in respect of tribe or caste, membership of the village family or of the late village headman's family (if it be not the village family), resident, character and other matters, to be the village headman of the particular village or group of villages comprised in the tenancy.

It is also necessary to consider S. 231 which runs as follows :

231.—All suits and applications instituted or made under this Act, for which no period of limitation is provided elsewhere in this Act, shall be commenced and made respectively within one year from the date of the accruing of the cause of action. Provided that there shall be no period of limitation for applications under Ss. 28, 31, 34, 50, 61, 75, 105 or 121.

The Act by Ch. 15 provided for the preparation of a record of rights and obligations of raiyati and other classes of tenants, and by S. 132 provided that when a record has been finally published the entries made therein should be conclusive evidence of the rights and obligations of the tenants to which such entries relate and of all particulars recorded in such entries. It will be necessary therefore to refer to the record of rights which has been put in as evidence in the case. This record of rights was published in 1910 ; it is headed "Record of rights of pradhan in pradhani mauza of Lango." It gives as the name of the pradhan, Ram Kol, resident in the village; it finds that he originally held under a patta for three years from 5th April 1931, which provided that a fresh settlement would be taken under a patta at the expiry of the term but that no fresh settlement was made under a patta. It states the various rights which the pradhan, either has, or has not, and certain grounds on which the pradhan might be ejected. The record also states that the landlord as superior jotdar has no right to get the pradhan rent enhanced during the term of the lease; that the pradhani rights are not heritable but that the pradhan has the right to hold possession in the absence of a patta ; it states the right of the landlord or superior jotdar to make pradhani settlements with a different person in certain events and it further affirms or negatives various other rights. It is stated in the notes of the Assistant Settlement Officer in reference to Lango that one Jadab Bhumij of Dablabera was Ghatwali Atirikta pradhan of the village, that he resigned in 1891 and that then the village was settled in ordinary pradhani with one Ramu Kol. This record would seem clearly on its face to show that there was by custom a pradhan in Lango. There is also certain evidence given in the course of the proceedings before the Deputy Commissioner from which it appears that Ramu Kol died leaving no sons in about 1917. The villagers who gave evidence say that his brother Ambra then succeeded, or was regarded by them as succeeding as pradhan. At that time the village with other land was under lease to the Midnapore Zamindary Company. The evidence of the tenants is somewhat conflicting. They claim that Ambra became a pradhan by custom on the death of Ramu Kol, but it seems that, at least in many cases, they either paid rent to the Company or deposited the rent in Court. So, matters seem to have proceeded until the appellant became possessed of the estate on the expiration of the lease on 14th September 1929. The appellant then proceeded to attempt to

enforce his rights to khas possession. An application was thereupon made by the tenants under S. 74-A. This initiated the present proceedings.

It may be noted that the headman or pradhani system is characteristic of the social organization of the aboriginal tribes who established themselves in Chota Nagpur before the advent of the Hindus; in some cases the headmen seem to have had police duties also imposed upon them so that such tenancies came to be regarded as ghatwali tenancies. The application under S. 74-A came before the Deputy Commissioner of Singbhum. He heard the villagers who presented the petition, now respondents herein, and objections on the part of the appellant. On 28th April 1930, he gave his decision, which stated that after the death of Ramu Kol
the Midnapur Zamindari Co. made the village khas. Since then, there had been nothing but trouble to the tenants, the landlord and every one else concerned.

Some of the raiyats deposited their rents in Court, and the others did not do so because they could not afford it. He thought it unnecessary to discuss the questions raised on behalf of the appellant as to limitation, custom, etc.; he was of opinion that Lango was a village which obviously required the aboriginal pradhan both from the point of view of the landlord and from that of the villagers. He appointed Ambra Ho as the natural pradhan of the village.

The appellant then brought an action in the Civil Court for a declaration that this order of the Deputy Commissioner was made without jurisdiction and the Munsif on 16th January 1931, in the suit which was No. 93 of 1930 declared that the decision of the Deputy Commissioner was made without jurisdiction because he had no jurisdiction under the section without first deciding whether Lango was held by a pradhan by custom. He also discussed the facts of the case, but he himself expressly recognized that his statements were merely obiter dicta. The matter came again before the Deputy Commissioner, who, on 19th August 1932, expressed the view that his predecessor who made the previous order was of opinion that the village did by custom have a headman. The matter then went before the Commissioner who directed the Deputy Commissioner to decide the question of custom and also the question of limitation raised under S. 231. A further enquiry was then held by the Deputy Commissioner who held in effect on the evidence before him that there was a custom of pradhani at Lango which had not been broken and decided that Ambra should be appointed as headman. From this decision, an appeal was brought before the Commissioner who made an order on 11th June 1933, holding that it was clear that the custom of the village headmanship extended to this village and that the custom had not been broken because the villagers had stood out resolutely against the attempt of the landlord to break the custom of headmanship and had never acquiesced in the wrong, and that there was a continuing wrong so that the cause of action referred to in S. 231 had accrued within one year of the application.

There was a further appeal to the Board of Revenue, who on 10th November 1933, gave their decision in a reasoned resolution delivered by Mr. Dain. As regards custom, the resolution held that the decisions of the Courts below were the outcome of their views as to the facts, and that the Board of Revenue would not intervene in regard to their agreed finding. On the question of limitation the Board of Revenue did not agree that the cause of action could be put as a continuing wrong for purposes of S. 231, but decided that the section did not bar the suit because the competence of an application under S. 74-A depended on the existence of the vacancy rather than on its occurrence at a particular moment. Emphasis was placed on the language of the section which was not "when" a tenancy has been vacated and from that the inference was drawn that the cause of action was as has just been defined. The resolution concluded with these words :

On the merits, the orders of the Courts below are obviously right. In a remote aboriginal village, the presence of the headman is essential to village welfare. The Board therefore declines to interfere.

On the question of custom, there are clearly findings of fact of the Deputy Commissioner and the Commissioner and this Board sees no reason whatever for going behind or interfering with these findings. It has been strenuously argued that the findings are vitiated either because there is no evidence on which they could be based or because a custom must be an ancient custom of the village, whereas on the evidence this vil-

lage was of quite recent foundation; according to one view it was clear that the village was founded for the first time by Ramu Kol not long before 1891, or on the other view stated in the village notes of the Assistant Settlement Officer it had been in existence some time before 1891, because Jadab Bhumij of Dablabera had been made Ghatwali pradhan. But in either case, it was argued, there could be no ancient custom. Their Lordships are unable to accept this view. In their judgment, assuming that the village was of recent foundation, it was founded by members of the tribe who brought to its foundation their ancient custom. The Board are satisfied that there was abundant evidence of a pradhani custom in the village and this is abundantly clear from the Record of Rights. Accordingly they see no ground in law for reviewing the findings of fact of the Commissioner or the Deputy Commissioner. It was, however, further contended that the findings of fact cannot stand and indeed that the whole proceeding was incompetent because in 1917 when Ramu Kol died, S. 74-A which was only enacted in 1920, was not in force and could not have a retrospective effect. Their Lordships cannot accept this contention. At the time when S. 74-A was enacted there was, according to the findings of the Deputy Commissioner and the Commissioner, in fact a vacancy; the tenancy of the village headman had in fact been vacated and there appears to be no reason why S. 74-A as soon as it came into operation should not be applied to that state of things.

The question of limitation which arises under S. 231 is somewhat peculiar. It was forcibly contended on behalf of the appellant that S. 231 of the Act applies to applications under S. 74-A because it deals with applications made under the Act and because S. 74-A is not one of the sections which are expressly excluded from the limitation provisions. That may be accepted, but the difficulty which arises is to apply to the position under S. 74-A the words "the cause of action." S. 74-A according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event of a vacancy and that application may be made either by the landlord or by the tenants. It pre-supposes that there is a custom requiring the appointment of a village headman and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear therefore more natural to say that as there is not in the strict sense a cause of action under S. 74-A, but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants or both, S. 231 is incapable of application. It has however been dealt with in the proceedings below on the footing that S. 231 does apply and cause of action has been construed somewhat liberally as including a right of making an application. Where the propriety of the application being granted has, as here, been disputed by the landlord, the view accepted by the Commissioner and the Deputy Commissioner was that there was a continuing wrong. It is not however easy to apply the idea of a wrong to a case of this sort where either side may apply and all that has happened is that there has been a delay in making the application. The delay no doubt was due to the fact that matters were allowed to drift until the appellant, the landlord, took possession on the termination of the lease. If then the idea of a continuing wrong is rejected, there remains to be considered the view accepted by the Board of Revenue, namely, that the right of application is a continuing right which endures so long as there is a vacancy.

Their Lordships are prepared to accept that as the most reasonable construction on the assumption that S. 231 does apply. It would fit in with the exigencies of the case and indeed with the language of S. 74-A which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary, the section makes the right of applying conditional on a state of facts, namely, where a tenancy has been vacated. While that condition exists, there is no ground for fixing on any specific moment of time. If the language had been "when a tenancy has been vacated" the matter, it may be, would have required to be considered differently and it may be that the limitation period, if these were the words, would run from the moment of the vacancy occurring, but that is not the language of the section, and counsel for

the appellant had refused to argue that time ran from the moment of the vacancy which in this case would be 1917. The alternative which they proposed was that it should run from the time when the landlord was taking active measures to enforce khas possession. Their Lordships cannot so construe the section. Accordingly there is no reason to differ from the conclusions arrived at by the Board of Revenue. Their Lordships' judgment is that the appeal should be dismissed and they will humbly so advise His Majesty.

B.D./R.K. *Appeal dismissed.*

Solicitors for Appellant —

A. J. Hunter & Co.

Respondents ex parte.

*** A. I. R. 1938 Privy Council 65**

(*From Patna*)

20th December 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mt. Anurago Kuer — Appellant.

v.

Darshan Raut and others —

Respondents.

Privy Council Appeal No. 52 of 1935.

*** Hindu Law—Partition—Proof of—Entry in Record of Rights showing share of each member is evidence of partition.**

Under the Mitakshara School of Hindu law, the partition of the joint estate consists in defining the shares of the co-parceners in the joint property, and it is not necessary that there should be an actual division of the property by metes and bounds. The definition of shares may be proved inter alia by an entry in the Record of Rights showing the share of each member of the family. Such an entry will be evidence of the severance of the joint status. [P 65 C 2]

J. M. Parikh and Behari Lal Anantani —*for Appellant.*

Respondents ex parte

Sir Shadi Lal.—On 23rd August 1915, three persons, namely Mahesh, his son Rijhawan, and his nephew Inderdeo, granted a muquarrari (permanent lease at a fixed rent) of a plot of land measuring about 40 bighas, situated in Telhara in the district of Motihari, to one Ganesh Raut. The plaintiff, Mt. Anurago Kuer, who is the widow of one Sitaram, a brother of Mahesh's father, Kesheo, laid claim to a moiety of the land on the ground that it belonged to her husband, and that on his death it devolved upon her and her co-widow Rajo Kuer. The latter widow died in 1923, with the result that the plaintiff became the sole owner of her husband's estate. On 22nd August 1927, a day before the expiry of the prescribed period of limitation, she brought the present suit for the recovery of her husband's share of the land against the lessee, who died during the pendency of the suit and is now represented by his successors-in-interest. The lessors also were impleaded as defendants, but they have not defended the suit. The Subordinate Judge at Motihari, who tried the case, allowed her claim; but on appeal by the lessee's representatives, the High Court of Judicature at Patna reversed the decree granted by the trial Judge and dismissed the suit. From the decree dismissing her suit, the plaintiff has brought this appeal, which has been heard ex parte.

To succeed in her appeal, the plaintiff must show (1) that her husband Sitaram was the proprietor of one-half of the land leased in August 1915, and (2) that his estate devolved upon the plaintiff. She however failed to establish these points, upon which her claim was founded; and the suit brought by her has therefore been rightly dismissed. The Courts below are not agreed on the question whether Sitaram was joint with, or separate from, his brother Kesho and his descendants in estate at the time of his death. It is a well-settled rule of the Hindu law, as followed by the Mitakshara School, by which Sitaram and his brother were admittedly governed, that the partition of the joint estate consists in defining the shares of the co-parceners in the joint property, and that it is not necessary that there should be an actual division of the property by metes and bounds.

The definition of shares may be proved, inter alia, by an entry in the Record of Rights showing the share of each member of the family. Such an entry will be evidence of the severance of the joint status. In the light of this rule of Hindu law their Lordships have examined the evidence produced by the plaintiff. They observe that not only is there no document to prove that Sitaram was entered as owner of a moiety of the land leased to Ganesh Raut, but that there is nothing to show that he had any interest in the land in question at the time of his death. The property originally belonged to one Bhawani Dutt Missar, who in January 1900 sold it to Rijhawan, a son of Mahesh, and Baldeo, a son of Mahesh's brother. The

transferees were members of Kesho's family, and his descendants alone subsequently dealt with the property.

Now, the plaintiff's claim is founded upon her title by inheritance from her husband, and it is clear that if he had no interest in the property, he could not transmit it on his death to his widow. It is said that he died in 1908, but no mutation was effected in the revenue record that any estate descended from him either to the plaintiff or her co-widow. It was not until 1917 that an entry was made in the Khewat for the first time to the effect that the widows of Sitaram had one-half share in the property. But there was no occasion for making this change, as Sitaram had died nine years prior to the date of that entry, and the persons recorded as proprietors had granted a lease to Ganesh Raut in 1915. This change in the Khewat was inspired, as explained by the High Court, by a desire to create a proof of title in favour of the widows, and thereby to recover for the family one-half of the land from the permanent lessee. Their Lordships concur with the High Court that the plaintiff has failed to establish her title to the property. They will accordingly humbly advise His Majesty that this appeal should be dismissed.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondents—
T. L. Wilson & Co.

*** * A. I. R. 1938 Privy Council 66**

(*From Allahabad*)

20th December 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Babu Manmohan Das — Appellant.

v.

Baldeo Narain Tandon and others — Respondents.

Privy Council Appeal No. 93 of 1934, Allahabad Appeal No. 12 of 1933.

*** * (a) Limitation Act (1908), Sch. 1, Arts. 57, 58 — Lender transferring to borrower cheque drawn by another person and endorsed in his favour — Art. 57 and not 58 applies.**

Article 58 applies to a case in which the lender draws his own cheque and gives it to the borrower. It does not govern a suit in which he transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. The suit comes within the ambit of Art. 57 only. [P 67 C 1].

*** * (b) Limitation Act (1908), Sch. 1, Art. 58 — Cheque is paid only when it is cashed by lender's bankers — Mere handing over of cheque to borrower or crediting of amount to borrower by borrower's bank is no payment of cheque.**

A cheque is paid under Art. 58 when it is cashed by the lender's bankers, for it is only then that the lender's money passes into the hands of the borrower and the loan is made by the former to the latter. The mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period prescribed by Art. 58 begin to run against the lender when the cheque received by the borrower is given by him to his own bank and the amount is credited to him by the bank. [P 67 C 1]

A. M. Dunne and M. H. Rashid — *for Appellant.*

Dr. H. R. Abdul Majid and J. Chinna Durai — *for Respondents.*

Sir Shadi Lal. — This appeal arises out of a suit brought by the plaintiff Baldeo Narain Tandon (hereinafter referred to as Tandon) against a firm called the United Provinces Aniline Dyes Company (described as "the firm" for convenience) for the recovery of Rs. 14,950 with interest. The High Court of Judicature at Allahabad, dissenting from the trial Judge, has granted a decree in favour of the plaintiff; and from that decree Manmohan Das, one of the partners of the firm, has appealed to His Majesty in Council. The plaintiff stated that the sum of Rs. 14,950 was advanced by him as a loan to the firm by a cheque for that amount. The cheque in question was drawn by the Secretary of the Finance Board of the Congress Reception Committee, Amritsar, on 12th August 1923, in favour of another firm called Bond Brothers for the price of the work done by them for the Reception Committee. It was endorsed by two of the partners of Bond Brothers, namely Tandon and Banerji, in favour of one Sri Kishan Das Wahal.

Now, it is common ground that Sri Kishan Das Wahal was the manager of the defendant firm, and it appears that the money payable on the cheque was received by him on behalf of the firm. The plaintiff claims that he received the cheque from his partners in Bond Brothers in part payment of the money due to him by the latter, and that he made it over to the firm as a loan. The first question for consideration is whether the firm received the money, which was payable on the

cheque. It is conceded that, if the money was received by the firm, it must be deemed to be a loan made by the plaintiff. Now, a satisfactory proof of the receipt of the money is furnished by the account books of the firm; and it cannot therefore be disputed that the plaintiff is entitled to recover it.

The money due on the cheque was paid on 30th August 1923, by the Central Bank of India at Amritsar, on which the cheque was drawn, and the suit for its recovery was instituted on 27th August 1926. It is suggested that the suit is governed by Art. 58 of Sch. 1 to the Indian Limitation Act, 1908, which prescribes a period of three years for a suit for the recovery of money lent, when the lender has given a cheque for the money lent by him. That Article however applies to a case in which the lender draws his own cheque and gives it to the borrower. It does not govern a suit in which he transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. The period of three years prescribed by the Article begins to run from the date on which the cheque is paid, and a cheque is paid when it is cashed by the lender's bankers: (1868) L R 3 C P 300.[1] It is only then that the lender's money passes into the hands of the borrower, and the loan is made by the former to the latter; the mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period begin to run against the lender when the cheque received by the borrower is given by him to his own bank, and the amount is credited to him by the bank.

The suit does not therefore come within the ambit of Art. 58, but is governed by Art. 57, which is a general Article applicable to a suit for the recovery of money payable for the money lent; and the *terminus a quo* is the date on which the loan is made. The loan in the present case was made on 30th August 1923, when the money was received by the borrower; and the suit, which was brought within three years from that date, must be held to be within the time. The only other point argued on behalf of the appellant, Manmohan Das, is that he was not a partner in the firm in question, when the loan was contracted; and he cannot therefore be liable for the payment of the debt. The learned Judges of the High Court at Allahabad, upon an examination of the evidence, have decided that the appellant was a partner at the time of the transaction, and this conclusion is supported, not only by the testimony of the plaintiff, but also by the balance sheets of the firm. The evidence, which stands unrebutted, shows that the appellant was a partner in the firm when the money was lent, and it is immaterial that he severed his connexion with the firm afterwards. The judgment given by the High Court cannot be challenged on any of the grounds urged on behalf of the appellant, and must be affirmed. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellant — *Nehra & Co.*

Solicitors for Respondents — *Douglas Grant & Dold.*

1. Garden v. Bruce, (1868) L R 3 C P 300 = 31 L J C P 112=17 L T 544=16 W R 366.

*** A. I. R. 1938 Privy Council 67**

(*From Calcutta*)

20th December 1937

LORD ALNESS, SIR SHADI LAL AND SIR GEORGE RANKIN.

Bengal Nagpur Railway Co. Ltd. — Appellants.

v.

Ruttanji Ramji and others — Respondents.

Privy Council Appeal No. 65 of 1936, Bengal Appeals Nos. 15 of 1934 and 8 of 1935.

(a) Privy Council — Concurrent findings on question of fact—Fact that Courts below were not influenced by same considerations is not sufficient to disturb them.

It may be that the Courts below, in arriving at the same result upon the evidence on a question of fact, have not been influenced by precisely the same considerations, but that circumstance would not furnish any ground for disregarding the rule forbidding a fresh examination of facts for disturbing concurrent findings by the Courts below, which has been usually followed by the Board. [P 69 C 1]

*** (b) Contract Act (1872), S. 73—Original rates payable to contractor agreed in contract between Railway and contractor, abandoned by consent of parties — Substituted proposed rates not accepted by contractor — Contract still in operation — Work done by contractor in performance of it and accepted by Railway — Contractor is entitled to fair and reasonable rates.**

Where the original schedule of rates, payable to the contractor fixed under a contract between the Railway and the contractor was abandoned with the consent of both the parties and the new enhanced rates proposed to be substituted by the Railway for those rates were not accepted by the contractor, but the contract employing the contractor remained in operation and the contractor did the work for the Railway, which the latter accepted, the amount which the contractor is entitled to recover from the Railway for the work done should be determined on the basis of fair and reasonable rates. [P 69 C 1, 2]

(c) Interest — Prior to suit, when payable stated.

Interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest as for instance the Court may award interest at the rate of 6 per cent. per annum, when no rate of interest is specified in a promissory note or bill of exchange under S. 80, Negotiable Instruments Act. [P 70 C 1]

(d) Interest Act (1839), S. 1, Proviso — Proviso applies where Court of equity allows interest.

The Proviso to S. 1 applies to a case in which the Court of equity exercises jurisdiction to allow interest. But in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction : *A I R 1929 P C 185, Foll.* [P 70 C 1]

(e) Contract Act (1872), S. 73, Illus. (n) — Illus. (n) does not allow creditor interest upon his debt when he is not entitled to it under any law.

The Illus. (n) to S. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. [P 70 C 2]

(f) Interpretation of Statutes — Illustration to section does not modify section.

An illustration to a section in a statute cannot have the effect of modifying the language of the section which alone forms the enactment. [P 70 C 2]

*** (g) Contract Act (1872), S. 73—Interest by way of damages for wrongful detention of debt cannot be allowed.**

Section 73 is merely declaratory of the common law as to damages. Interest cannot be allowed at common law by way of damages for wrongful detention of debt : *A I R 1915 P C 48*; (*1893*) *A C 429 and A I R 1929 P C 185, Rel. on.* [P 70 C 2]

Charles Bagram and L. M. Jopling — *for Appellants.*

A. M. Dunne, J. M. Parikh and P. N. Mitra — *for Respondents.*

Sir Shadi Lal. — These consolidated appeals arise out of an action brought by the plaintiffs to recover from the Bengal Nagpur Railway Company, Limited (hereinafter referred to as "the railway"), a certain sum of money on account of the price of the work done by them for the railway. The circumstances which have led to the litigation may be shortly stated. On 31st March 1920, one Ramji Madhoji, (described hereinafter as the contractor), the predecessor-in-interest of the plaintiffs, entered into three contracts with the railway for doing earth work, bridge work and miscellaneous work respectively, in the construction of a branch railway line known as Amda Jamda branch. The terms of each contract, which were embodied in a document variously described as schedule of works or schedule of rates, prescribed, inter alia, the rates at which payments were to be made to the contractor for various items of work to be done by him. In May 1920, the contractor commenced work in the section of the line allotted to him; but he soon found that owing to the wild and uninhabited nature of the locality through which the line had to pass, and to other local disadvantages, it was difficult to induce labourers from distant places to come and work there; and he encountered many other difficulties. He did not take long to realize that the rates specified in the schedules were wholly inadequate and asked for their enhancement. The railway recognized the reasonableness of the claim and enhanced the rates in August 1920, and framed new schedules of rates. But the contractor refused to sign the revised schedules, as he considered even the new rates to be inadequate. He was however asked to continue the work and on 5th October 1920 he received from the assistant engineer of the railway a letter in these terms :

As there appears to be a certain amount of discontent with regard to the schedules of rates for this Subdivision and as I have received several letters containing proposals as to what the rates should be, I wish to bring to your notice the following points which have been conveyed to me by the District Engineer as a result of his last inspection :

1. It is not the policy of the Bengal Nagpur Railway to cause loss to their contractors by paying them final rates at which they cannot make a profit.

2. Work has scarcely been started at present and it is far too early to judge whether a further increase in rates is necessary. The final rates necessary cannot be determined until the work is in full swing.

3. Any representations which you may have to make will be sympathetically considered after a good effort has been put forth (say for six months) which will enable an estimate to be made of the actual expenses incurred.

This letter was followed by another letter in December 1920 which sanctioned a further increase in certain rates mentioned in the schedule of rates. Even this revision of rates was unacceptable to the contractor, but the railway entered the revised rates in the printed schedules without obtaining the consent of the contractor. The work however continued and was completed early in 1925; the contractor receiving payments periodically on the basis of periodical statements of accounts or bills called "on account bills". It appears that during the progress of the work and even after its completion, attempts were made by the parties to settle finally the rates at which payment should be made to the contractor for the various items of work done by him, but these attempts proved abortive. The contractor, in the meanwhile, having died, his representatives brought the present action for the recovery of the money due to them; and the main point in dispute, upon which the parties have produced voluminous evidence, is whether the rates as specified in the original schedules were abandoned with the consent of the parties. The trial Judge holds that the oral and documentary evidence adduced by the parties confirmed as it is, by their conduct, leads to the conclusion that "the original scheduled rates were abandoned by the mutual consent of parties". On appeal, the learned Judges of the High Court, upon a fresh examination of all the relevant circumstances have endorsed that conclusion in clear and emphatic terms.

Now, the issue determined by the Courts in India is one of fact, and their Lordships do not think that there is any valid reason for departing from the general rule which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. It may be that the Courts below, in arriving at the same result upon the evidence, have not been influenced by precisely the same considerations, but that circumstance would not furnish any ground for disregarding the rule which has been usually followed by the Board. Their Lordships must therefore take it as established that the original rates were abandoned with the consent of both the parties. It is also clear that the railway proposed to substitute for those rates certain enhanced rates, but the proposed increase was considered inadequate by the contractor and was not accepted by him. The result was that, while the old rates had disappeared, there were no new rates to take their place. The contracts employing the contractor to perform certain work for the railway however remained in operation; and it is obvious that the contractor did the work for the railway, and that the latter accepted that work.

The question is how the price of that work should be determined. In their Lordships' opinion, the amount, which the contractor is entitled to recover from the railway, should be determined on the basis of fair and reasonable rates. Adopting this principle, the trial Judge assessed the price of the work done by the contractor at Rs. 87,839, but on appeal the High Court have reduced it to Rs. 66,980.10.6. This amount has not been challenged by the learned counsel in their arguments at the Bar, and their Lordships must therefore accept the conclusion of the High Court that the plaintiffs are entitled to recover from the railway Rs. 66,980.10.6. The railway was liable to pay this amount to the plaintiffs on 26th July 1925, and they claim interest on the money for the period during which it was withheld from them. The suit for the recovery of the money due to them was commenced by the plaintiffs on 29th November 1927, and there can be no doubt that the award of interest from the date of the institution of the suit is governed by S. 34, Civil P. C. By that section it is provided that the Court may order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. The High Court have allowed interest at 6 per cent. per annum from the date of the decree of the trial Court to the date of payment on the sum found due to the plaintiffs at the date of the said decree, and this decision cannot be challenged. Nor can there be any objection to the order for the payment of interest from the date of the institution of the suit to the date of the decree. The rate of interest awarded by the High Court is however 9 per cent., and this rate would

be excessive, if it depended only upon the rule contained in the Civil Procedure Code.

The crucial question however is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution of this question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under S. 80, Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent. per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 32 of 1839, the Court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case was not a sum certain. The Interest Act however contains a proviso that "interest shall be payable in all cases in which it is now payable by law". This proviso applies to cases in which the Court of equity exercises jurisdiction to allow interest. As observed by Lord Tomlin in (1929) A C 631[1]:

> In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.

The present case does not however attract the equitable jurisdiction of the Court and cannot come within the purview of the proviso. The learned Judges of the High Court have allowed interest by way of damages caused to the plaintiffs for the wrongful detention of their money by the railway, but the question is whether this view can be sustained. There is a considerable divergence of judicial opinion in India on the question of whether interest can be recovered as damages under S. 73, Contract Act, where it is not recoverable under the Interest Act. Now, S. 73, Contract Act, gives statutory recognition to the general rule that, in the event of a breach of a contract, the party who suffers by such a breach is entitled to recover from the party, breaking the contract, compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon Illus. (n) to that section. The illustration however does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment.

As observed in 43 I A 6,[2] S. 73 is merely declaratory of the common law as to damages, and it has been held by the House of Lords in (1893) A C 429[3] that interest cannot be allowed at common law by way of damages for wrongful detention of debt. The judgment of the Privy Council in (1929) A C 631[1] dealt with a statute of New Brunswick, the relevant section of which was identical in terms with the Interest Act of India, and it was held in that case that the plaintiff was not entitled to interest at law, and, as the case did not attract the equitable jurisdiction of the Court, no rule of equity in regard to interest could have any application. The law has however been amended in England by S. 3, Law Reform (Miscellaneous Provisions) Act, 1934, empowering

1. Maine and New Brunswick Electrical Power Co Ltd v. Hart, (1929) 16 A I R P C 185 = 119 I C 615=(1929) A C 631=98 L J P C 146 =141 L T 370 (P C).

2. Jamal v. Moolla Dawood, Sons & Co., (1915) 2 A I R P C 48=31 I C 949=43 I A 6 = 43 Cal 493=8 L B R 343 (P C).

3. London, Chatham & Dover Railway Co. v. South Eastern Railway Co., (1893) A C 429 =63 L J Ch 93.

a Court of Record to award interest on the whole or any part of any debt or damages, at such rate as it thinks fit, for the whole or any part of the period between the date when the cause of action arises and the date of the judgment. But there has been no such amendment of the law in India.

For the reasons stated above, their Lordships think that the plaintiffs have not established their right to recover interest prior to the date of the suit, but they must get interest under S. 34, Civil P. C., at 6 per cent. per annum on Rupees 66,980 annas 10 and pies 6, the principal sum found to be due to them, from 29th November 1927, the date of the institution of the suit, to 14th March 1931, the date of the decree of the trial Court, and on the sum so adjudged, further interest at the same rate from 15th March 1931 until payment. The result is that the appeal brought by the defendants is allowed only to the extent that the amount of interest awarded by the High Court to the plaintiffs is reduced as stated above, but it is dismissed on all other grounds. The appeal preferred by the plaintiffs also is dismissed. On the question of costs it is to be observed that the defendants, while succeeding on the question of interest, have failed on all the main points raised by them. Having regard to the amount involved in each appeal, and to the other circumstances of the case, their Lordships consider that the defendants should pay to the plaintiffs one-half of the costs of the consolidated appeals, and they will humbly advise His Majesty accordingly.

V.B.B./R.K. *Decree varied.*

Solicitors for Appellants — *Sanderson Lee & Co.*

Solicitors for Respondents — *Stanley Johnson & Allen.*

*** A. I. R. 1938 Privy Council 71**

(*From Ajmer-Merwara*)

20th December 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Syed Altaf Hussain and others — Appellants.

v.

Diwan Syed Ali Rasul Ali Khan and others — Respondents.

Privy Council Appeal No. 8 of 1936.

*** (a) Mahomedan Law—Wakf—Alienation by Sajjada Nashin of his share in offerings cannot bind his successors.**

The right of a Sajjada Nashin to receive a share of the offerings is a right attached to the office and each successive incumbent of that office is entitled to receive that share as long as he holds the office. Hence alienation made by a Sajjadda Nashin of his share in the offerings cannot bind his successors. [P 72 C 1]

*** (b) Mahomedan Law — Wakf — Articles presented for use of tomb — Neither Sajjada Nashin nor Khadims are entitled to them.**

The qabarposhes, as well as gold or silver vessels or implements presented for the use of the tomb must be kept by the tomb committee on behalf of the tomb; and neither the Sajjada Nashin nor the Khadims are entitled to participate in those offerings. [P 72 C 2]

A. M. Dunne and Sir Thomas Strangman — *for Appellants.*

W. Wallach and Mrs. J. Clark — *for Respondents.*

Sir Shadi Lal.—The dispute in this case relates to the distribution of the offerings made by the pilgrims to the tomb of Khwaja Moinuddin Chisti at Ajmer. The tomb in question, generally known as Durgah Khwaja Sahib, Ajmer, has for centuries past been a place of pilgrimage for devout Moslems; and the presents made by the pilgrims to the Durgah have led to frequent disputes between the Sajjada Nashin (called Diwan Sahib) on the one side, and the Khadims (servitors) on the other side. The Sajjada Nashin is a descendant of the Saint, while the Khadims are the descendants of the original disciples of the Saint. In September 1912, Diwan Sharfuddin, the predecessor of the present Sajjada Nashin, granted to the Khadims a perpetual lease of the Sajjada Nashin's share of the offerings made at the Shrine for Rs. 500 a year. For about ten years there was no controversy between the Sajjada Nashin and the Khadims about the division of the offerings. In 1922 Diwan Sharfuddin died and was succeeded by Diwan Syed Ale Rasul Ali Khan, who refused to recognize the validity of the lease granted by his predecessor in respect of the Sajjada Nashin's share of the offerings. His refusal resulted in the revival of the old dispute, and ultimately led to the present litigation.

The main combatants are the Sajjada Nashin and the Khadims, but there is also a Durgah Committee which is interested in the offerings. This Committee consists of persons who were appointed, under the Religious Endowments Act, 20

of 1863, to perform the duties of the trustees of the Durgah property. The trial Judge adjudicated upon the rights of the various parties to the dispute, but on appeal his decision has been modified by the Judicial Commissioner of Ajmer Merwara in respect of a few matters which will be discussed presently. The Sajjada Nashin as well as the Khadims are dissatisfied with the appellate judgment, and have appealed to His Majesty in Council. Their Lordships, after examining the arguments submitted to them, do not think that that judgment can be successfully challenged except on one small point. In view of the importance of the points in controversy, their Lordships however consider it advisable to discuss them seriatim.

On the question of the validity of the perpetual lease of the Sajjada Nashin's share of the offerings, the Court of Appeal, concurring with the trial Court, holds that the right to receive a share of the offerings is a right attached to the office of the Diwan, and that each successive incumbent of that office is entitled to receive that share as long as he holds the office. An alienation made by a Diwan of his share in the offerings cannot bind his successors. This decision has not been impugned by the learned counsel for the Khadims, and it is therefore clear that the lease cannot preclude the present Diwan from claiming his legitimate share in the offerings.

As regards the offerings made by the pilgrims, it was conceded by all the parties before the Court of Appeal that a distinction must be drawn between those articles, such as qabarposhes (coverings for the tomb), which are presented for the use of the Durgah, and the other offerings which are made at the Durgah. While the offerings belonging to the latter category may be divisible between the Diwan and the Khadims, those made for the specific use of the Durgah are the property of the Durgah. The Khadims however claim that an article presented for the use of the Durgah becomes the property of the Durgah only if the donor pays a tawan or custody money to them in respect of that article. There is however no documentary evidence to support the theory that the Khadims are entitled to an article presented for the use of the Shrine, if the donor thereof does not pay them custody money. They place their reliance only on oral evidence, which has been rightly disbelieved by the Court of Appeal. Indeed, the claim is wholly unreasonable and cannot be sustained. The qabarposhes, as well as gold or silver vessels or implements presented for the use of the Durgah, must therefore be kept by the Durgah Committee on behalf of the Durgah; and neither the Diwan nor the Khadims are entitled to participate in those offerings.

There remains the question of the respective rights of the Diwan and the Khadims in the offerings which are not the exclusive property of the Durgah. It is contended by the Diwan that he is entitled to all the offerings made at the Durgah to the exclusion of the Khadims, and this claim is based upon a firman alleged to have been granted by the Emperor Shah Jahan in 1640 A. D. This firman is however of doubtful authenticity, and the Courts below have concurred in holding that the firman has not been acted upon, and that the practice which has been followed by the successive Diwans and Khadims in respect of the distribution of the offerings runs counter to the terms of the firman. Their Lordships see no valid reason for departing from the concurrent findings on a question of fact, and the claim of the Diwan to exclude the Khadims from a share in the offerings at the Durgah must therefore be rejected. This is the only point raised by the Diwan in his appeal, and that appeal must therefore fail.

It appears that the offerings, which are not intended for the use of the Durgah, are made at various places in the buildings attached to the shrine; but all the valuable presents are made within the main building or the sacred dome which contains the tomb of the Saint. Now, the Khadims maintain that the Diwan is entitled to share only in the offerings made at the foot of the tomb, and that he has no right to share in the offerings made at other parts of the tomb. The Court of Appeal holds that there is no evidence to support this distinction, and it is significant that no such distinction was suggested by the Khadims in their written statement. The finding of the Appellate Court on the issue must therefore be affirmed.

There are certain other offerings of small value which have by usage been regarded as the exclusive property of the Khadims, whether they are made inside the dome or outside. The learned Judicial

Commissioner finds that to this category belong copper coins and cowries, and gold and silver articles (other than coins) of a value of less than eight annas and also cotton cloth of an inferior quality. The Khadims urge that they are entitled to all coins of two annas or less in value, and that it is immaterial whether they are made of copper or any other metal such as silver or nickel. It appears that the Khadims, who worked as servants of the Shrine, were allowed to take coins of a small value which were given by the pilgrims for their services, and there is no valid reason why the Sajjada Nashin, who occupies a position of importance and dignity should claim a share in coins of small value which are given by the pilgrims as rewards for the services rendered to them by the servitors. Nor is there any evidence to suggest a differentiation between coins of copper and those of other metals. Indeed, it is doubtful whether the learned Judge of the Appellate Court intended to make any such distinction. Their Lordships think that the Khadims are entitled to all the coins not exceeding two annas in value irrespective of whether they are made of copper or any other metal. To this extent the appeal preferred by the Khadims is allowed, but in all other respects the judgment pronounced by the Court of Appeal must be affirmed.

Their Lordships desire to make it clear that the Durgah Committee referred to in the judgment appealed against is a Committee to hold and to administer the Durgah property on behalf of the Durgah, and has no right as against the institution. The result is that while the appeal brought by the Diwan should be dismissed, that preferred by the Khadims should be allowed only to the extent mentioned above. Considering that the Khadims succeed on only one minor point but fail in all other respects, their Lordships think that the parties should bear their own costs here. They will humbly advise His Majesty accordingly.

K.S./R.K. *Order accordingly.*

Solicitors for Appellants—
T. L. Wilson & Co.

Solicitors for Respondents—
Douglas Grant & Dold.

*** A. I. R. 1938 Privy Council 73**

(*From Lahore*)

6th December 1937

LORD THANKERTON, SIR LANCELOT SANDERSON AND LORD NORMAND (LORD PRESIDENT OF THE COURT OF SESSION).

Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura — Appellants.

v.

Managing Committee, Sunder Singh-Mallah Singh, Rajput High School, Indaura and others — Respondents.

Privy Council Appeal No. 62 of 1936.

*** (a) Specific Relief Act (1877), S. 42, Proviso — Plaintiff claiming to be trustee and administrator of institution—Neither plaintiff nor defendant in possession or control of institution—Suit for declaration by plaintiff is maintainable — Injunction against defendant is further relief.**

Where the plaintiff claims to be a trustee and administrator of certain institution of which neither he nor defendant is in possession or control of the management, a suit for mere declaration under S. 42 is maintainable; and where it is not open to the plaintiff to pray for possession also as against the defendant, injunction against the defendant is further relief within the meaning of the Proviso to S. 42. [P 75 C 1]

*** (b) Societies Registration Act (1860), Ss. 3, 19—Presumption of proper registration —Not certificate of registration under S. 3, but copies of Rules and Regulation and Memorandum certified under S. 19 are sufficient proof of due registration.**

Presumption that an association is duly registered arises not on the certificate of registration granted by the Registrar under S. 3, but on the copies of the Rules and Regulations and Memorandum certified under S. 19, which constitutes them prima facie evidence of the matters therein contained. [P 76 C 1]

(c) Evidence Act (1872), S. 106—Question whether plaintiff is authorized to represent institution in suit—Proof of the minutes of the meeting of Managing Committee constituting such authority is sufficient to discharge burden on plaintiff.

Where the question is whether plaintiff is authorized by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due authority is available, it is sufficient to discharge any burden on the plaintiff under S. 106. [P 76 C 2]

*** (d) Trust — Creation of — Charitable endowment by a Hindu in Punjab — Purpose should be clearly specified — Property intended should be set apart — Divestiture by donor of property is necessary — But no writing essential.**

For the foundation of a charitable endowment by a Hindu in the Punjab, no writing is required. What is necessary is that the purpose be clearly

specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. The evidence of divestiture may be contemporaneous and in such a case the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him.

[P 76 C 2]

Sir Herbert Cunliffe, Dr. Abdul Majid and Mrs. M. J. Clark —

for Appellants.

J. P. Eddy and T. F. R. McDonnell —

for Respondents.

Lord Thankerton.—This is an appeal from a decree of the High Court of Judicature at Lahore, dated 31st May 1934, which reversed a decree of the Senior Subordinate Judge, Kangra at Dharamsala, dated 19th December 1927. The respondents, the Managing Committee, Sunder Singh-Mallah Singh, Rajput High School, hereinafter referred to as "the Committee", filed the suit through Kharak Singh, member of the Committee and Manager of the School, and Chaudri Ram Singh, a member of the Committee, on 8th November 1926, and impleaded as defendants Sunder Singh-Mallah Singh Sanatan Dharam Rajput High School Trust, hereinafter referred to as "the Trust", through ten named trustees, of whom Rai Bahadur Chaudri Mallah Singh was the first named. In the plaint the respondents claimed (a) a declaration to the effect that "the plaintiff Committee is the managing body, trustee and administrator of Sundar Singh-Mallah Singh Rajput High School, Indaura, that the defendants have no connexion whatsoever with this school or its property, nor have they any right as trustees or administrators in the said school, that the plaintiff alone is the trustee and administrator of this property, in the interests of the said school, and that he alone is entitled to the income and authorized to spend it", and (b) a perpetual injunction against interference by the defendants. The property claimed was detailed as follows :

1. Rs. 95,000 on fixed deposit in the Punjab National Bank, Lahore. 2. War bonds of the value of Rs. 5000, also deposited with the said Bank. 3. Bonds, mortgage deeds and promissory notes, of the value of Rupees one lakh, and 4. Lands and school buildings, etc., mentioned in a list attached to the plaint.

The Trust through the trustees filed its Jawab-i-Dawa denying the right of the plaintiff to any relief, and, on the pleadings the Subordinate Judge framed the following issues :

(1) Whether a suit for a declaration lies ? (2) Whether the plaintiff Managing Committee has locus standi to maintain the suit and has duly authorized Kharak Singh and Ram Singh to institute the suit ? (3) Whether the plaintiff Committee is not a duly registered body ? (4) Whether the management for the school and its properties become vested in the plaintiff Committee as trustees ? (5) What is the nature and the extent of the properties up to the date of the new trust, dated 26th November 1925 ? (6) Whether the trust, if any, created in favour of the plaintiffs was invalid, because possession had not been transferred to them? (7) Whether on 26th November 1925, defendant 1 was still competent to deal with this property and create a new trust in favour of the defendants in connexion therewith ?

After considering the oral and documentary evidence, the learned Judge decided each of the issues in favour of the defendants and dismissed the suit. On appeal, this judgment was reversed by the High Court and decree was granted in the Committee's favour, declaring that the Indaura High School buildings and the lands attached to them, the sum of Rupees 95,000 and war bonds for Rs. 5000, and the mortgagee's rights under a deed of mortgage dated 2nd June 1920, in favour of the Indaura School, are property held in trust for the benefit of the school, and that the Committee have the right to manage the school and to manage this property for the purposes of the school. A perpetual injunction was granted against the interference of the defendants. The present appeal is against that decree.

This regrettable litigation had its origin in the following circumstances: Chaudri Mallah Singh, who was anxious to make suitable provision for the education of the youths of his community, had for long maintained a primary school in his village Indaura. In 1919, being anxious to extend this institution and to put its management into the hands of a representative committee of the Rajput community, sixteen leading Rajputs were selected and constituted into a committee for the management of the school. Rules and Regulations and a Memorandum were drawn up and filed and registered under the Societies Registration Act (Act 21 of 1860), the association being registered as Sundar Singh-Mallah Singh Rajput High School, and the sixteen selected Rajputs being named as the Managing Committee, the first-named being Mallah Singh as President. R. 4 provided that all the moveable and immovable property of the school should vest in the Managing Committee, but no

specific properties were mentioned, and no deed of endowment was drawn up.

As many of the members of the Committee lived at some distance from the school, their attendances do not appear to have been at all regular, and there seems little doubt that Mallah Singh took the main burden of management. In 1925, apparently regarding himself as still having a free hand, and having formed the desire to further extend the institution into a college, Mallah Singh executed on 26th November 1925 the deed of trust in favour of the defendant-appellants, whose attempt to enter on their duties at the school roused the respondent Committee. This led to intervention of the police and proceedings under Ss. 144 and 145, Criminal P. C., which were started on 11th May 1926. Eventually the parties agreed to leave the school and its properties in the possession of Mallah Singh, and to seek their remedy in the Civil Court. As the trial Judge points out, this possession of Mallah Singh was his personal possession and was not in his capacity as President of either the Committee or the Trust. The present suit was thereafter brought on 8th November 1926. With this preliminary outline, the various issues may be taken in turn.

Issue 1 raises a question under S. 42, Specific Relief Act, 1877, and, in particular, the proviso, which precludes the granting of a declaration "where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so". The Subordinate Judge held that a suit of declaration did not lie, on the ground that the plaintiff was neither in possession nor in control of the management of the school and that the proper form of the suit would have been one for possession and management of the school and not merely a declaration of such right, and that the plaintiff had omitted to seek this further relief. The High Court took the contrary view, on the ground that the defendants were not in possession or in a position to deliver possession of the properties, and that therefore there was no further relief available to the plaintiffs against the defendants. Their Lordships agree with the High Court in this view ; and it may be added that where it is not open to the plaintiff to pray for possession also as against the defendant, injunction is further relief within the meaning of the proviso ; see Pollock and Mulla on the Specific Relief Act (Edn. 6) at page 853, and authorities there cited.

Issue 3 and the first part of Issue 2 raise the same question as to the validity of the registration of the Committee under the Act of 1860, the relevant sections of which are as follows :

I. Any seven or more persons associated for any literary, scientific or charitable purpose, or for any such purpose as is described in S. 20 of this Act, may, by subscribing their names to a Memorandum of Association, and filing the same with the Registrar of Joint-Stock Companies under Act 19 of 1857, form themselves into a Society under this Act.

II. The Memorandum of Association shall contain the following things (that is to say)—

The name of the Society.

The objects of the Society.

The names, addresses, and occupations of the Governors, Council, Directors, Committee, or other governing body to whom, by the Rules of the Society, the management of its affairs is entrusted. A copy of the Rules and Regulations of the Society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the Memorandum of Association.

III. Upon such Memorandum and certified copy being filed, the Registrar shall certify under his hand that the Society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of fifty rupees, or such smaller fee as the Governor-General of India in Council may from time to time direct ; and all fees so paid shall be accounted for to Government.

V. The property, moveable and immovable, belonging to a Society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such Society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such Society by their proper title.

VI. Every Society registered under this Act may sue or be sued in the name of the President, Chairman or Principal Secretary or Trustees, as shall be determined by the Rules and Regulations of the Society, and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion; provided that it shall be competent for any person having a claim or demand against the Society, to sue the President or Chairman, or Principal Secretary or the Trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

XVI. The governing body of the Society shall be the Governors, Council, Directors, Committee, Trustees, or other body to whom by the Rules and Regulations of the Society the management of its affairs is entrusted.

XIX. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection ; and any person may require a copy or extract of any document or any part of any document, to be certified by the Registrar, on payment of two

annas for every hundred words of such copy or extract ; and such certified copy shall be prima facie evidence of the matters therein contained in all legal proceedings whatever.

The learned Subordinate Judge held that the Committee was not duly registered, but his decision is vitiated by his failure to give effect to S. 19. He placed the burden of proving the seven signatures to the original memorandum on the plaintiffs, and held that, in the absence of such proof, he could not hold that the Association was duly registered. The High Court reversed this finding, and held that the defendants had failed to disprove the presumption arising on the certificate of the Registrar dated 7th December 1919. Their Lordships are of opinion that the presumption arises, not on the certificate of registration granted by the Registrar under S. 3, but on the copies of the Rules and Regulations and Memorandum, certified under S. 19, which constitutes them prima facie evidence of the matters therein contained. The only evidence by which the appellants sought to overcome the presumption was that of Kharak Singh under cross-examination, when he stated :

I did not see the original Articles of Association (nor sign them) sent to Registrar. Nor can I tell about the other trustees as to whether they signed or not. I do not know whether Kirpa Ram sent on the letter of consent to the Registrar . . . . Barring the letter of consent I sent no other application or paper to Registrar. I cannot say with regard to this matter anything about Chaudri Sahib. I cannot say who produced the Articles of Association before the Registrar.

Whatever one might think probable, it is left uncertain whether this witness was referring to the Memorandum as the Articles of Association ; counsel were unable to inform their Lordships definitely what was the reason of the brackets round the words "nor sign them". If the defendants really desired to displace the presumption in this respect, it was clearly their duty to seek to recover the original memorandum and to put the signature thereon to the witness. Their Lordships are therefore of opinion that the Association was duly registered and had therefore locus standi to maintain the suit.

There remains the question under the latter part of issue 2, whether Kharak Singh and Ram Singh were duly authorized to institute the suit. It is now admitted that the minutes of meeting of the Managing Committee dated 31st July 1926 constitute ex facie a due authority to Kharak Singh and Ram Singh to institute the suit, but the appellants maintained (a) that the respondents had failed to discharge the burden of proof laid on them by S. 106, Evidence Act, in that they had not proved that due notices of the meeting had been given to the members of the Committee, and (b) that, in any event, it had been proved by the evidence of Kharak Singh and of Mallah Singh that they had not received such notices. Their Lordships agree with the High Court that the evidence of Mallah Singh is unreliable, and the evidence of Kharak Singh does not prove anything as to the notices. But their Lordships are of opinion that the proof of the minutes of meeting is sufficient to discharge any burden on the respondents, and that the appellants were bound to give notice in their pleadings if they were going to raise this point and to have had an issue framed on it. The only point taken by the appellants in their pleadings was that they were not bound by the resolution, as, after the creation of the Trust, the Committee ceased to have any existence in law, and Issue 2 is not apt to put this question in issue. Their Lordships therefore hold that the appellants are not now entitled to raise this question.

Issues 4 and 6 are conveniently taken together. The first question is whether the school buildings and the land attached to them, as they stood at the time of the registration of the Association, became irrevocably vested in the Managing Committee. The High Court state :

It is not disputed that for the foundation of a charitable endowment by a Hindu in this Province no writing is required. What is necessary is that the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. Whether he has done so is to be determined by his subsequent acts and conduct. All these propositions are well established. It is not disputed that a valid endowment once created cannot be revoked by the donor.

Their Lordships agree with this statement, except that the evidence of divestiture may be contemporaneous, as in this case, and, in such a case, the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him. Their Lordships agree with the High Court that the Subordinate Judge wrongly laid stress on the subsequent alleged neglect of their duties by members of the Committee. The appellants sought to maintain that the

propositions were qualified in the present case by some customary law ; but, if so, the appellants were bound to plead it and put it in issue, which has not been done. In the opinion of their Lordships, R. 4 of the Rules and Regulations, to which Mallah Singh was a party, taken along with Ss. 5 and 16 of the Act of 1860, was sufficient to vest the buildings of the school and the attached lands, as they then existed, in the Committee. The Subordinate Judge himself has found that the Committee appointed its office-bearers "and the management of the school was made over to them". It must be remembered that the Trusts Act of 1882 does not apply to charitable endowments. Their Lordships are therefore of opinion, in agreement with the High Court, that the school buildings and attached lands were irrevocably dedicated by Mallah Singh at the time of the registration of the Association, and further that any subsequent alteration of these buildings or additions to them must be held to have accrued to the original dedication.

As regards the fixed deposit of Rupees 95,000 and the Rs. 5000 of war bonds, the letter of Mallah Singh to the Punjab National Bank, dated 18th November 1922, which included the resolutions of the Managing Committee and enclosed a copy of the Rules and Regulations, affords ample evidence of dedication and divesture in favour of the Committee of these two properties. If further evidence were needed, Mallah Singh's letter of 21st March 1924 to Kirpa Ram, an officer of the Committee, affords corroboration. The deed of mortgage by Anup Singh and others, dated 2nd June 1920, states :

> We have mortgaged, without possession, the aforesaid land to the High School, Indaura, Tahsil Nurpur, started in the name of Sardar Chaudri Sundar Singh and Rai Sahib Chaudri Mallah Singh, residents of Indaura, Tahsil Nurpur, for Rs. 6,000, half of which comes to Rs. 3000, and have received the mortgage money from Rai Sahib Chaudri Mallah Singh as per detail given below.

Their Lordships agree with the High Court that this constitutes a clear dedication of the mortgagees' rights to the school, with consequent vesting in the Committee. This renders it unnecessary to consider separately Issues 5 and 7. It follows that the appeal fails, and their Lordships will humbly advise His Majesty that the decree of the High Court should be affirmed and that the appeal should be dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Francis & Harker.

Solicitors for Respondents —
Nehra & Co.

A. I. R. 1938 Privy Council 77
(*From Lahore*)
20th December 1937

LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Lala Atma Ram — Appellant.

v.

Thakur Sadhu Singh and another — Respondents.

Privy Council Appeals Nos. 127 and 128 of 1936.

(a) Custom (Punjab)—Alienation—Agriculturist unable to manage cultivation and indebted, selling land to non-agriculturist with sanction of Deputy Commissioner—Sale held act of good management.

Where an agriculturist who was not able to manage the cultivation, very much indebted and not even able to pay the land revenue, sold the land to a non-agriculturist with the sanction of the Deputy Commissioner :

Held that the sale was an act of good management and could not be attacked by his sons.

[P 79 C 2]

(b) Custom (Punjab)—Alienation — Alienee must prove either legal necessity in fact or that he made bona fide enquiry into alleged necessity—He is not bound to see to actual application of money.

The onus lies on the alienee to prove either that there was legal necessity in fact which would justify the alienation, or that he made a proper and bona fide enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. If he fails to prove that there was a necessity in fact, alienation may still be upheld if he proves that he made enquiry as to the existence of the alleged necessity, and that the facts represented to him were such as, if true, would have justified the transaction. If he discharges this burden, he is not bound to see that the money paid by him is actually applied by the alienor to meet the necessity : *6 M I A 393 (PC), Rel. on.*

[P 79 C 2 ; P 80 C 1]

A. M. Dunne and W. Wallach — *for Appellant.*

J. M. Parikh—*for Respondents.*

Sir Shadi Lal.—On 12th May 1931, two brothers, Agar Singh and Nandlal Singh, who were proprietors of a one-third share in the village Bajika, situated in Tahsil Sirsa of the Hissar district, entered into an agreement with the appellant, Rai Sahib Lala Atmaram, to sell the whole of their

estate in that village to him for Rs. 52,000. In the deed of agreement they set out the reasons for selling the land in these terms :

We are unable to manage the cultivation work of the estate. Besides we owe debts, interest whereupon is swelling day by day. The revenue of the estate is also due from us. There is no other alternative but to sell the estate for payment of the debts and the revenue.

As they were members of an agricultural tribe notified under a special statute called the Punjab Alienation of Land Act, 13 of 1900, and the proposed vendee, Rai Sahib Lala Atma Ram, was not a member of an agricultural tribe, they could not sell the land to him without obtaining the sanction of the Deputy Commissioner of the district to the sale. They accordingly recited in the agreement that they had applied to the Deputy Commissioner for permission to sell the land, and that after obtaining the required sanction they would execute a sale deed in favour of the vendee.

Sub-section (3) of S. 3 of the Statute imposes upon the Deputy Commissioner, dealing with such an application for sanction to sell land, the duty of making an enquiry into the circumstances of the proposed alienation ; and it was only after considering the result of the enquiry required under the law that the Deputy Commissioner made an order on 1st September 1931, sanctioning the sale. After obtaining the requisite sanction, both the brothers jointly executed in favour of Rai Sahib Lala Atma Ram, on 22nd September 1931, a deed of sale in respect of the land, and received Rs. 48,812-10-9, in the presence of the Sub-Registrar who registered the deed, and also admitted to have received the balance of the price as set out in the document. The balance, which amounted to only Rs. 3187-5-3, included Rs. 800 received by them as earnest money, and Rs. 1500 deposited with the vendee for the redemption of a part of the land from a mortgagee, and about Rs. 800 for payment by him to Government on account of the arrears of land revenue and water rate due from them.

On 28th November 1932 two suits were brought by the sons of the vendors to impeach the sale, one suit by the sons of Agar Singh, claiming possession of a moiety of the land as their father had died in April 1932, and the other by the sons of Nandlal Singh asking for a declaration that the alienation should not affect their right to recover possession of the other half of the land on the death of their father. The trial Judge, after a careful consideration of the issues raised between the parties, dismissed both the suits. On appeal by the sons of the alienors, the High Court at Lahore set aside the decrees dismissing the suits and allowed the claim in each case subject to the payment of Rs. 3700 by the plaintiffs to the vendee. From the decrees of the High Court, the vendee has brought to His Majesty in Council these two appeals which have been consolidated.

The Courts below have concurred in holding that the whole of the price for the land was paid by the vendee as detailed in the sale deed. They are also agreed that the plaintiffs' attempt to depict their fathers as men of immoral character and extravagant habit has wholly failed. As regards the validity of the transaction, the trial Judge decided that the sale was an act of good management and should be upheld. But this view was not accepted by the Judges of the High Court, Addison and Abdul Rashid JJ., whose judgment on this point is neither clear nor convincing.

Their Lordships have examined the circumstances which led the vendors to make the sale and induced the Deputy Commissioner to give sanction to the transaction, and have reached the conclusion that the view taken by the trial Judge is fully justified. It must be remembered that the vendors resided in a village called Dhingsara which is at a distance of more than 15 miles from Bajika where the land in dispute is situate. They were therefore unable to cultivate the land themselves; and had to employ tenants to cultivate it. In their application to the Deputy Commissioner for the grant of sanction to sell the land they made it clear that owing to their residence in Dhingsara they could not carry on satisfactorily "the reclamation and cultivation work" of the land in question, and that the tenants in occupation of the land "do not pay rent" to them, nor do they pay water rate for water used by them for irrigating the land. The applicants also point out that "the estate yields a very small income", and that they have not been able to pay even the land revenue to Government for two years, with the result that they had incurred debts, the interest on which was "swelling day by day". On these grounds they asked for permission to sell the land to the appellant for Rs. 52,000, a price which, they said, no member of an agricultural tribe was prepared to pay.

Now the sanction, if granted, would involve the permanent transfer of land belonging to a member of an agricultural tribe to a person who was not a member of an agricultural tribe; and the Deputy Commissioner had to satisfy himself whether there were adequate grounds for giving sanction which would justify a departure from the policy of the Government as indicated in the statute and emphasized in the instructions issued to Deputy Commissioners by superior revenue authorities. The application was therefore referred to the Tahsildar in charge of the tahsil in which the land was situated for an enquiry and a report. Chaudhri Lajja Ram, the Tahsildar, who made the enquiry into the circumstances of the proposed sale, in his deposition before the Court, describes Bajika, the village in question, as a very unsatisfactory village from the standpoint of the landlord. The major portion of the agricultural land in the village depends for irrigation upon rain water which is precarious. As to the tenants in the village he says that they "are thieves by profession. They do not pay their debts, rents and dues." The Tahsildar still advised the vendors not to sell their land, as it was their ancestral property, but they expressed their inability to follow his advice and complained of the nonpayment of rent by the tenants. In their statements, the vendors not only confirmed the allegations made by them in their application for sanction but also added that they owed large sums to various creditors, to whom they had to pay interest. They also explained that if they failed to discharge their debts soon, the result would be that their entire property would be sold.

The Tahsildar issued notice inviting members of agricultural tribes to purchase the land, but in spite of various steps taken by him and a subordinate revenue officer to inform the proprietors and occupancy tenants belonging to agricultural tribes of the proposal to sell the land, no person came forward to buy it. The Tahsildar, after making the enquiry, submitted his report recording reasons for his recommendation that the applicants should be granted permission to sell the land. This report was forwarded by him to the Subdivisional Officer, Sirsa, who in turn despatched it to the Deputy Commissioner with a strong recommendation that the sanction should be granted. Upon a consideration of the report and other relevant documents, the Deputy Commissioner recorded an order granting permission to the vendors to sell the land to the appellant. It was only after obtaining this sanction that the vendors executed the sale deed in question. This survey of the circumstances, which induced the Deputy Commissioner to grant his sanction in compliance with the requirements of the statute, makes it clear that the vendors, for various reasons, found the property to be an encumbrance, and realized that, if they did not sell the land in order to find money to discharge their debts, they would run the risk of losing even the land which was situated in the village where they resided. They were therefore naturally anxious to save that land, which they could satisfactorily manage and which was a source of profit to them.

On these facts, the conclusion is irresistible that the sale was an act of good management on the part of the vendors, and this was the view expressed by the trial Judge. Their Lordships think that his decision has been set aside by the High Court on erroneous grounds; and there can be no doubt that, if the sale was an act of good management, it cannot be challenged by the plaintiffs. But this is not the only reason for upholding the sale. It is satisfactorily established that the appellant, before purchasing the property, made proper and bona fide enquiry as to the indebtedness of the vendors, and satisfied himself about the existence of necessity for the sale. The evidence on this point is furnished by the testimony of the vendee himself and of the persons who were deputed by him to make the enquiry. It is to be observed that this evidence, which was believed by the trial Judge, receives corroboration from the official enquiry which was conducted by the revenue officers for the purpose of determining the question whether sanction for the sale should be granted or refused.

Now, it is a well-established rule that the onus lies on the alienee to prove either that there was legal necessity in fact which would justify the alienation, or that he made a proper and bona fide enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. If he fails to prove that there was a necessity in fact, alienation may still be upheld if he proves that he made enquiry as to the existence of the alleged necessity, and that the facts represented to him were such as,

if true, would have justified the transaction. If he discharges this burden, he is not bound to see that the money paid by him is actually applied by the alienor to meet the necessity: *vide* inter alia, 6 M I A 393.[1] In the opinion of their Lordships, the enquiry contemplated by the law was made by the vendee in this case, and this ground alone would sustain the sale made in his favour. Their Lordships have no hesitation in holding that the judgment appealed from is wrong and must be set aside. They will therefore humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees granted by the High Court be set aside, and those made by the trial Judge dismissing the suits be restored. The respondents must pay the costs incurred by the appellant here as well as in India.

K.S./R.K. *Appeals allowed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
T. L. Wilson & Co.

1. Hunoomanpersaud Panday v. Munraj Koonweree, (1854-57) 6 M I A 393=18 W R 81*n* =2 Suther 29=1 Sar 552 (P C).

* * **A. I. R. 1938 Privy Council 80**

(*From Allahabad: A I R 1934 All 52*)

16th December 1937

LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Syed Sabir Hussain and another — Appellants.

v.

S. Farzand Hasan and others — Respondents.

Privy Council Appeal No. 90 of 1935, Allahabad Appeal No. 4 of 1934.

(a) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 37—Question regarding dower—Mahomedan law should be applied as rule of decision.

Though the topics of divorce, dower, betrothal, family relations, are not particularized in S. 37 as in the enactments of other provinces, yet this does not import an intention that the social and family life of Muslims should be differently regarded from province to province. The right of the wife to her dower is a fundamental feature of the marriage contract; it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses at more than one point. While by the Mahomedan law, marriage itself is viewed as a civil contract and the agreement to pay a certain amount of dower is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. The Mahomedan texts and the principles of Mahomedan law have therefore to be applied to determine every facet of the law of dower among Mahomedans in Bengal, Bihar, Agra and Madras, as in the other provinces. [P 82 C 1, 2; P 83 C 1]

(b) Mahomedan Law—Applicability—In matters purely of procedure Courts are governed by their own procedure and not by rules of Mahomedan law relating to procedure.

Even where Mahomedan law applies to the subject matter, the Courts in British India are governed by their own method and procedure and do not apply those rules of the Mahomedan law which are described as "provisions which go only to the remedy, *ad lites ordinationem*, being matters purely of procedure as to array of parties, production of evidence, res judicata, and review of judgment, etc. [P 83 C 2; P 84 C 1]

*** * (c) Mahomedan Law—Dower — Shia law — Father contracting marriage of his minor son — Son not having independent means of his own—Father is liable for dower —This doctrine should not be interpreted in light of general law—Doctrine is substantive rule of law and cannot be described as canon of interpretation or rule of evidence —After father's death dower can be recovered from heirs in proportion to their shares: *56 All 401=A I R 1934 All 52=151 I C 304*, *Reversed.***

The doctrine as to Shia law of dower laid down in Shuraya-ul-Islam, that where the father contracts his infant son in marriage and the son has not independent means of his own, the father is liable for the dower, cannot be required to conform to a particular feature of the general law nor should it be interpreted in the light of it. Moreover the doctrine is a substantive rule of law and cannot be described as a canon of interpretation or construction or a rule of evidence. To a doctrine which enlarges the right of the wife or improves her security in respect of dower, an important purpose must be attributed and it would only mutilate the substantive law laid down by the Suraya if its rule as to the liability of the husband's father were to be ignored: *56 All 401 =AIR 1934 All 52=151 I C 304*, **Reversed.** [P 84 C 1]

In the event of the death of the husband's father, his heirs are liable for the dower in proportion to their respective shares in the estate of the father and the decree against the heirs will be executed against each heir in accordance with S. 52, Civil P. C. [P 84 C 1, 2]

Dr. Abdul Majid and J. Chinna Durai — *for Appellants.*

J. E. Godfrey — *for Respondents.*

Sir George Rankin. — This appeal is brought by the plaintiffs from a decree of the High Court at Allahabad dated 31st October 1933, affirming a decree of the Subordinate Judge at Moradabad dated 22nd January 1930. The appellants are the father and mother of one Mt. Ejaz Fatma, who died on 19th March 1926,

aged about 21 years. On 17th August 1914 she had been married at the age of nine to the infant son of one Sibti Hasan. The husband's name was Farzand Hasan (defendant 1). At the time of the marriage, he was only nine or ten years old. The amount of dower agreed upon at the time of the marriage was Rs. 25,000 : it is evidenced by the entry in the register of Ali Husain, the qazi who solemnized the marriage, and is not in dispute. Husband and wife lived together from 1921 till the wife's death in 1926. The appellants by their suit, which was brought on 16th March 1929, after the death of Sibti Hasan, claimed as heirs of Ejaz Fatma, their daughter, entitled between them to a one-third share of her estate. They impleaded her husband, Farzand Hasan, his mother, brother and sisters, and claimed from them as the heirs of Sibti Hasan, deceased, a one-third share (Rs. 8,333-5-4) of the dower due to Ejaz Fatma, alleging that

> this alliance was made at the desire of Saiyed Sibti Hasan and he had himself taken the personal liability of payment of the dower debt.

At the trial the appellants sought to prove that Sibti Hasan had at the time of the marriage made an express promise to become liable for the dower as a surety for his son. This was disbelieved by the trial Judge, whose finding on the point was not impugned in the High Court. The respondents, on the other hand, denied that Sibti Hasan had been present at the marriage or had acted therein as the guardian of his son. This denial has been disbelieved by both Courts in India, and before the Board it is not in dispute that the marriage was entered into by authority of Sibti Hasan as father of the infant bridegroom and of the appellant Sabir Hasan as father of the infant bride. These two men indeed were relatives and on the same day the appellants' son was married to Sibti Hasan's daughter (defendant 3). Now the parties are Shias; and before the Courts in India and before the Board the appellants have contended that, according to the Mahomedan law applicable to Shias, Sibti Hasan became liable to pay the dower of Ejaz Fatma by reason of the fact that his infant son Farzand Hasan had no means of his own at the time Sibti Hasan married him to Ejaz Fatma. For this proposition of law the appellants vouch the authority of the Suraya (Shuraya-ool-Islam). In Book I, which treats of nikah or marriage, the fifth chapter treats of muhr or dower. Of this chapter the third section, headed "The Laws of Dower", deals with 15 "cases" giving a statement of the law applicable to each. This is followed by five further cases described as "branches from the preceding" and of these the fourth is as follows :

Fourth :

> If one should contract his infant son in marriage, and the child has independent means of his own, he is liable for the dower. If the child is poor, the obligation rests entirely on the father, and in the event of his death must be discharged out of the whole of his property, whether the child should arrive at maturity and become wealthy, or die before it. If therefore the father should have paid the dower, and the youth should come to maturity and then divorce his wife before coition, the son and not the father has a right to reclaim half the dower, the payment by the father being considered in the light of the law, as a gift to the son.

The learned Judges of the High Court (Niamatullah and Collister JJ.) state that the Sharah Loma gives the same rules, and that they have not been able to find any book of authority on Shia law which conflicts with these authorities upon the point. On this footing, it would seem to follow from the well-known principle established by the Board's decision in 2 M I A 441[1] at page 447 that the doctrine of the Suraya should be applied to the present case. Both Courts in India have however refused to apply it. The learned trial Judge considered that it was not consonant with justice, equity and good conscience. The High Court rightly noticed that if it be deemed to be a rule regarding "marriage" or "any religious usage or institution" then S. 37, Bengal, Agra and Assam Civil Courts Act (12 of 1887) applies the Mahomedan law as such. But they did not think that the phrase "any religious usage or institution" covered the present case nor that the rule relied upon was a convenient or equitable rule, particularly in view of the practice prevalent in the province to stipulate for excessive sums as dower. They observed :

> The only contention which, in our opinion, can be put forward is that the question arising in this case is one "regarding marriage"; but it seems to us that the rule laid down in Shuraya-ul-Islam is no more than a canon of interpretation. The author is of opinion that where a guardian for marriage agrees, on behalf of his minor ward, to pay a certain amount of dower, there is an implication, that, in case the minor has no means to pay, the guardian would be deemed to be a surety for due payment. The Sunni doctors, on the other hand,

1. Deedar Hossein v. Zuhoor-oon-Nissa, (1841) 2 M I A 441=2 Suther App 5=1 Sar 217 (P C).

do not construe such an agreement as implying a personal undertaking. The rule may also be considered as a rule of evidence in so far that a personal undertaking by the guardian to pay dower, in case the minor is found to have no means of paying it, should be presumed. In any view of the matter, the vicarious liability of the father arises not from any substantive rule of Shia law relating to marriage, but is the result of deduction from given circumstances, and as such British Indian Courts are to be guided not by Muhammadan law but by rules of construction generally applicable or by the Indian Evidence Act. We entertain no doubt that a Shia father entering into any other contract, as guardian of his minor son, involving a pecuniary obligation cannot be saddled with personal liability by British Indian Courts. The agreement to pay dower in the same circumstances cannot be placed on a different footing. The liability, if it exists, arises from a civil contract and should be determined by the law applicable to contracts made by an authorized guardian.

There is no rule of general law in force in this province which justifies an inference that a guardian, entering into a contract on behalf of his minor son, renders himself liable as surety in the absence of an express contract to that effect nor is there anything in the Indian Evidence Act which justifies a presumption from the circumstances of such a case that a guardian makes himself personally liable.

This decision of the High Court does not proceed upon the view that the question concerning dower in the present case is not one "regarding marriage"; nor do they in the end dispute that the substantive law applicable to questions of dower under the Act of 1887 is the Mahomedan law of the school or sect to which the parties belong. This has however been disputed before the Board and their Lordships think it necessary to examine the matter with some care. In the provinces of Oudh, the Punjab, the Central Provinces, the North-West Frontier Province, and Ajmere Merwara, "dower" is one of the topics expressly mentioned by the Act which regulates the Civil Courts as subject-matters to which, in cases where the parties are Mahomedans, the Mahomedan law is to be applied as the rule of decision. Whether the position is in any way different in the provinces of Bengal, Bihar, Agra, Assam, under the Act of 1887, or in Madras under the similar language of Act 3 of 1873, is the question at issue. The phrase used in these Acts is "any question regarding succession, inheritance, marriage or caste or any religious usage or institution." The topics of divorce, dower, betrothal, family relations, are not particularized as in the enactments of other provinces, but in their Lordships' view this does not import an intention that the social and family life of Muslims should be differently regarded from province to province; or that in Bengal, Agra or Madras Muslims are not to be governed in such matters by their own personal law. The terms of S. 37 of the Act of 1887 merely repeat those of S. 24 of Act 6 of 1871, which in turn reproduce those of S. 15 of Bengal Regulation 4 of 1793, to which the Company's Courts had always given a wide interpretation and to which indeed they had in practice added: 1864 W R 185.[2] This Board in 11 M I A 551[3] and the Full Bench of the Allahabad High Court in 8 All 149,[4] have in no uncertain terms accepted these enactments as securing to the Mahomedan community the application of their own law to their domestic relations. The right of the wife to her dower is a fundamental feature of the marriage contract: it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses at more than one point:

> The marriage contract is easily dissoluble and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the lawgiver intended to restrain by rendering the rules as to payments of dower stringent upon the husband (per Mahmood J. in 8 All 149[4] at p. 158).

The period which has elapsed since the Regulation of 1793 and the area to which its language has been applied are too great to permit of much doubt remaining as to the substantive law of dower among Mahomedans in British India. A review of the cases upon dower decided under the Act of 1887 or its predecessor shows that while by Mahomedan law marriage itself is viewed as a civil contract and "the agreement to pay a certain amount of dower is a part of the contract of marriage" (54 All 806[5] at p. 809) the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. A summary of the results of many decisions was given by Lord Parker of Waddington when delivering the judg-

2. Zohoroodeen v. Baharoollah Sircar, (1864) W R 185.
3. Moonshee Busloor Ruheem v. Shums-oonnissa Begum, (1867) 11 M I A 551=8 W R 3=2 Suther 59=2 Sar 259 (P C).
4. Abdul Kadir v. Salima, (1886) 8 All 149=1886 A W N 53 (F B).
5. Qasim Husain Beg v. Kaniz Sakina, (1932) 19 A I R All 649=139 I C 371=54 All 806=1932 A L J 781.

ment of the Board in 43 I A 294[6] at p. 300 —an appeal from a Full Bench decision of the High Court at Allahabad :

Dower is an essential incident under the Mussulman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called "prompt," payable before the wife can be called upon to enter the conjugal domicile; the other "deferred," payable on the dissolution of the contract by the death of either of the parties or by divorce. . . . But the dower ranks as a debt, and the wife is entitled, along with the other creditors, to have it satisfied on the death of the husband out of his estate. Her right however is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board.

This passage illustrates how Mahomedan texts and the principles of Mahomedan law have been applied to determine every facet of the law of dower among Mahomedans—whether dower is payable apart from express agreement ; what principles determine its amount if unspecified ; whether it can be agreed or added to after marriage ; whether in whole or in part it is to be deemed to be "prompt" or "deferred"; whether prompt dower is payable on demand or otherwise ; whether non-payment of prompt dower is a defence to a husband's suit for conjugal rights before consummation ; or after consummation ; whether the promise of an excessive sum as dower can be enforced ; whether the wife is a mere unsecured creditor for dower ; whether a widow having obtained possession of her husband's estate in lieu of dower has a right to retain possession until the debt is satisfied. On all these matters, as is well known, the Courts will apply the Mahomedan law in Bengal, Bihar, Agra and Madras, as well as in the other provinces. Nor is it reasonable to suppose that any other law could be applied to determine whether dower can be remitted by the wife's father ; or by the wife herself ; what is the effect upon the wife's right to dower of her exercising her "option of puberty"; of her being divorced before consummation ; of her husband dying before consummation. In 49 All 557,[7] the parties were Sunnis and the High Court of Allahabad were not satisfied that the father became liable by the Hanafi law as a surety for his son by reason of his arranging the marriage. But their Lordships do not gather that the Division Bench in that case doubted that the matter fell to be decided by the appropriate Mahomedan law, and in their Lordships' opinion there is no room for doubt upon the point.

Their Lordships desire to advert particularly to the circumstances of the marriage contract in the present case. Although the Indian Majority Act (IX of 1875) does not affect the capacity of any person to act in the matter of marriage or dower (S. 2), the husband in the present case was by his own personal law a minor at the time of his marriage. He was married by his father in the exercise of a father's right so to do (the right of jabr). What law, save the Mahomedan law, makes any contract to pay dower binding upon the minor? In 14 I A 89[8] at p. 96, Lord Hobhouse pointed out that according to the general law of India, there is no rule which gives a guardian power to bind his infant ward by a personal covenant. The father's power as natural guardian to do so in respect of dower is the creature of the Mahomedan law of marriage, and the learned Judges of the High Court invert the true position when they proceed upon the view that there is no rule of general law which makes a guardian liable as surety when he enters into a contract on behalf of his minor son. If the general law is to control the matter the question will not arise. It is difficult to see why this particular doctrine of the Mahomedan law should be required to conform to a particular feature of the general law or should be interpreted in the light of it. It remains therefore to consider the distinction drawn by the learned Judges in the present case between "a substantive rule of the Shia law relating to marriage" and what is variously called " a canon of interpretation", a "rule of construction" and a "rule of evidence". Even where Mahomedan law applies to the subject

6. Hamira Bibi v. Zubaida Bibi, (1916) 3 A I R P C 46=36 I C 87=43 I A 294=38 All 581 (P C) on appeal from (1910) 33 All 182=7 I C 497=7 A L J 1025 (F B).

7. Muhammad Siddiq v. Shahab-ud-din, (1927) 14 A I R All 364=100 I C 636=49 All 557= 25 A L J 466.

8. Waghela Rajsanji v Masludin, (1887) 11 Bom 551=14 I A 89=5 Sar 16 (P C).

matter, the Courts in British India are governed by their own methods and procedure and do not apply those rules of the Mahomedan law, which Mahmood J. in 7 All 822[9] at p. 841, described as

> provisions which go only to the remedy, *ad litis ordinationem*, being matters purely of procedure as to array of parties, production of evidence, res judicata, and review of judgment, etc.

Their Lordships cannot agree however that the passage from the Suraya upon which the appellants rely expresses anything less than a substantive rule of law or that it can be described as a canon of interpretation or construction or a rule of evidence. The passage itself and its context are alike against this suggestion. To a doctrine which enlarges the right of the wife or improves her security in respect of dower, an important purpose must be attributed ; and in their Lordships' view it would only mutilate the substantive law laid down by the Suraya if its rule as to the liability of the husband's father were to be ignored. The learned Judges of the High Court interpret the rule as follows :

> According to the rule laid down in Suraya the father makes himself a surety for the due payment of dower in case his minor son has no means of paying it. The underlying principle is that the son's inability to pay must have been known to the father and if in spite of such knowledge he agreed on behalf of his indigent son to pay what was beyond the latter's means he should be deemed to have guaranteed the payment of the stipulated dower.

Their Lordships are not called upon in the present case to say whether this interpretation of the rule is in all respects correct. The matter was not fully argued at the bar, and no materials to illuminate the meaning of the text have been laid before the Board. Their Lordships are only prepared to hold that the appellants should recover against the heirs of Sibti Hasan on the footing that the decree of the trial Judge against Farzand Hasan is set aside. No point was taken in the Courts in India or at the hearing of this appeal upon the maintenance deed which Sibti Hasan executed on 15th August 1914, or on the omission of the plaintiffs to implead the other heirs of Ejaj Fatma. In their Lordships' view, the proper form of decree is against each of the heirs of Sibti Hasan for that proportion of the appellants' joint claim which corresponds to the share of each heir in the estate of Sibti Hasan. The decree will only be enforceable against each heir to the extent of assets come to his or her hands in accordance with S. 52, Civil P. C. As materials for ascertaining the share of each defendant are not before their Lordships, the exact terms of the decree must be framed by the High Court on receipt of His Majesty's order as to this appeal, unless the terms are settled by agreement at an earlier stage. Their Lordships do not consider that in this case the appellants have shown any right to an order for interest for the period prior to decree; and they find it unnecessary to consider whether in view of the Board's decision in 43 I A 294,[6] interest could in any circumstances be awarded in such a case as the present, where the wife was never in possession of her husband's property in lieu of dower. The ultimate decree however will carry interest at 6 per centum from the date of the Order in Council as to this appeal.

Their Lordships' conclusion is that this appeal should be allowed, that the decrees of the Courts in India should be set aside, and that in lieu thereof, there should be a decree in favour of the appellants against each defendant, payable out of the assets of Sibti Hasan, come to the hands of such defendant for such fraction of Rs. 8333.5.4 as corresponds to the share of such defendant in the estate of Sibti Hasan. The defendants must pay the appellants' costs throughout. Interest on the total sum decreed will run from the date of the Order in Council at 6 per centum per annum. Their Lordships will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellants — *Douglas Grant & Dold.*

Solicitors for Respondents—*Nehra & Co.*

A. I. R. 1938 Privy Council 84

(From Oudh : A I R 1935 Oudh 16)

16th December 1937

LORD MACMILLAN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Thakur Gajendra Shah — Appellant.

v.

Thakur Shankar Bakhsh Singh and others — Respondents.

Privy Council Appeal No. 5 of 1937, Oudh Appeal No. 22 1934.

9. Jafri Begum v. Amir Muhammad, (1885) 7 All 822=1885 A W N 248 (F B).

Deed — Construction — Settlement—*R*, a female, to be tenant for life of villages with no power to burden or transfer them—On her death, villages and entire property to become property of *S*—*R* to have absolute rights over moveables—Properties mortgaged to estate with possession — If properties redeemed by mortgagors or if *R* realizes amount by suit, *R* entitled to spend money as she liked—But *R* not to transfer mortgagee rights—*R* accepting very small sums from mortgagors in redemption—*R* held had no such power.

Under a deed of settlement, *R*, a female. was constituted a tenant for life of certain villages which she was expressly precluded from burdening or transferring. On her death, the villages and the entire property were to become the property of *S*. *R* was given absolute rights over the moveables. There were several properties also which stood mortgaged to the estate with possession regarding which it had been settled that if the mortgagors got these properties redeemed from *R* or the said *R* realized the amount due under them by means of a suit then she would be entitled to spend the principal and interest in any way she liked, but *R* was not to have the power to transfer these mortgagee rights. *R* accepted very small fraction of the mortgage money from the mortgagors in redemption of the mortgages :

Held that she had no such power under the settlement. [P 86 C 2]

A. M. Dunne and L. M. Jopling — *for Appellant.*

L. P. E. Pugh and S. Hyam — *for Respondents.*

Lord Macmillan.—On 8th April 1923, Harihar Bakhsh Singh, an infant two years of age died in right of a taluqdari estate known as Haluapur in the District of Sitapur, Oudh, and certain other real and personal property. Disputes arose as to the succession between Shankar Bakhsh Singh, the nearest male agnate of the deceased, and Raj Kuar, the deceased's paternal grandmother. These disputes were settled on terms embodied in a deed of arrangement between them, dated 6th March 1925. The question which their Lordships have to determine in the present appeal arises on the interpretation of this deed of arrangement. Under the settlement, as set forth in the deed, Raj Kuar was constituted the tenant for life of the villages owned by the deceased (with certain exceptions immaterial for the present purpose) and was expressly precluded from burdening or transferring them. On her death, the villages life-rented by Raj Kuar were to become the property of Shankar Bakhsh Singh (again with certain immaterial exceptions). Under para. 6 of the deed, the moveable property left by the deceased was to remain in the possession of Raj Kuar with power "to make any sort of transfer". Para. 7 dealt with "several mortgage deeds without possession" standing in the names of previous owners of the estate ; as to these, Raj Kuar was empowered to utilize or spend the principal and interest "in any way she likes". Then followed para. 8 which has given rise to the present controversy. It is thus expressed :

> That there are several properties also which stand mortgaged with possession to the estate regarding which it has been settled that if the mortgagors get these properties redeemed from Mt. Raj Kuar or the said Thakurain Sahiba realizes the amount due under them by means of a suit, then she will have the same powers as regards that money and the interest thereon as have been laid down in para. 7, but Mt. Raj Kuar shall have no power to transfer these mortgagee rights.

Under para. 9 it is provided that Shankar Bakhsh Singh shall be entitled to and enter in possession of the entire property mentioned in paras. 6 to 8 which will be left at the time of Mt. Raj Kuar's death.

The mortgages referred to in para. 8 fall into three groups. The total amount of principal thereby secured was about Rs. 21,000, and the security subjects consisted of shares in certain villages of which the remaining shares formed part of the deceased's estate. These mortgages had been outstanding for many years and the rents and profits of the mortgaged subjects had been enjoyed by the mortgagees. At the time of the transactions about to be narrated, the interest at compound rates had accumulated to an almost fabulous amount, the sum outstanding in the case of one of the mortgages being about three and a half crores. The equity of redemption of all the mortgaged properties was in Sumer Singh.

Such being the position of these mortgages, the following remarkable series of transactions took place in 1930. First, on 13th April of that year, Raj Kuar executed a registered deed in favour of Sumer Singh whereby she purported to "give back" to Sumer Singh and disencumber the mortgaged share in one of the villages in consideration of a payment of Rs. 16,500. The sum then due under this mortgage is stated to have been Rs. 2,52,704. Next, on 14th April 1930, Sumer Singh executed a series of conveyances in favour of Gajendra Shah, the son-in-law of Raj Kuar, whereby he purported to convey to the latter the equity of redemption of the mortgaged shares of the other villages for a total consideration of Rs. 2400. Then,

on 18th September 1930, Raj Kuar returned to Gajendra Shah the property of these mortgaged shares in consideration of a payment of Rs. 40,000. She at the same time executed a lease in favour of Gajendra Shah for ten years of a large number of villages appertaining to the Haluapar estate, but as this has been given up it is no longer of importance save as illustrating the relations between Raj Kuar and her son-in-law.

On 4th April 1931, Raj Kuar died and Shankar Bakhsh Singh thereupon became entitled to enter into possession of his rights under the deed of arrangement. Confronted with the series of transactions above set out, which, if valid, deprived him of all benefit from the mortgages with possession, he at once initiated the present proceedings against Gajendra Shah and his wife, and Sumer Singh, since deceased, whose representatives have been substituted in his place. In his plaint Shankar Bakhsh Singh challenges the validity of the reconveyances by Raj Kuar of the mortgaged subjects as being in contravention of the deed of arrangement and as colourable and fictitious transactions for the benefit of her son-in-law to the plaintiff's prejudice. The Subordinate Judge at Sitapur upheld the plaintiff's claim and granted him a decree for possession which on appeal was affirmed by the Chief Court of Oudh. Gajendra Shah, defendant 1, then brought the present further appeal to His Majesty in Council.

Before their Lordships, as before the Courts below, the contention of the appellant was that on a sound construction of para. 8 of the deed of arrangement Raj Kuar wat at liberty to accept any sum she pleased, however small, in redemption of the mortgages in question and that she accordingly acted validly and within her powers in accepting from the appellant Rs. 40,000 in redemption of the mortgages on the shares of the villages of which he, the appellant, had acquired the equity of redemption from Sumer Singh, notwithstanding that Rs. 40,000 represented only a fraction of the mortgage moneys due. Their Lordships find themselves in agreement with the Courts below in rejecting this reading of the clause in question. At the time when the deed of arrangement was entered into it was manifest that in view of the vast sums outstanding there was no reasonable prospect of the mortgages being redeemed but as the mortgage formed part of the estate it was proper that they should be mentioned and dealt with as items in the compromise. In contrast with the case of the mortgages without possession it was expressly provided that Raj Kuar should have no power to transfer the mortgages with possession. She was to have the principal and interest thereof to do with as she liked only (1) if the mortgagors got the properties redeemed from her or (2) if she realized the amount due under the mortgages by means of a suit.

When it is remembered that the villages had for many years been possessed in their entirety by the owners of the Haluapur estate, as to certain shares in property and as to the remaining shares as mortgagees with possession, it is in the highest degree improbable that Shankar Bakhsh Singh would have agreed to the mortgaged shares being left at the unfettered disposition of Raj Kuar, for, that would in effect be the result of permitting her to accept any sum she pleased by way of redemption from the mortgagors. If she was to have no power of transferring the mortgages, it was not likely that she should be empowered to extinguish them on any terms she might think fit to accept. In their Lordships' view the sound interpretation of condition (1)—"if the mortgagors get these properties redeemed from Mt. Raj Kuar"—is "if the mortgagors redeem the properties by paying up in full the mortgage moneys". It may be said that this was a contingency so remote as to be inconceivable. That may be so, but in a comprehensive settlement, such as the deed embodied, it was quite in order to cover every item of the estate, even if this particular provision was little more than a formality.

Their Lordships do not find it necessary to comment on the character of Raj Kuar's transactions with her son-in-law and Sumer Singh beyond saying that such an interpretation of the terms of para. 8 as would authorize transactions of this character is not an interpretation which commends itself either as reasonable in itself or as likely to have been intended by the parties to the deed when they framed it as they did. The transactions challenged thus cannot stand, being beyond the powers of Raj Kuar under the deed of arrangement as their Lordships construe it. Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and

the decree of the Chief Court of Oudh of 21st September 1934 be affirmed. The appellant will pay the first respondent's costs.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitor for Respondents —
Barrow, Rogers & Nevill.

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(*From Bombay*)

6th December 1937

LORD THANKERTON, SIR LANCELOT SANDERSON AND LORD NORMAND (LORD PRESIDENT OF THE COURT OF SESSION).

District Local Board, Ahmedabad and others — Appellants.

v.

Secretary of State — Respondent.

Privy Council Appeal No. 41 of 1937.

(a) Bombay Local Boards Act (6 of 1923), S. 48 — Lands belonging to Government before Act of 1869 could not vest in Local Board by virtue of Acts of 1869, 1884 and 1923 — Building and land given to Local Funds Committee before 1869 for management held did not become property of Local Board.

The pre-statutory Local Funds Committees had no power to acquire lands. That power was not conferred on any local funds committee till 1869 when the Act of that year conferred it on the new statutory committees. It necessarily follows that the lands which originally belonged to the Government could not have become vested in the pre-statutory committee. Nor could they have become vested *vi statuti* in the statutory body created in 1869, 1884 and 1923, for the statute merely conferred upon the new committee a power to acquire lands and transferred no property to it. Nor can it be said that such land should be deemed to have been transferred by the Government before 1869 to the individual members of the pre-statutory committee as trustees for that committee, and that the lands had vested by force of S. 41 of the Act of 1884 in the District Local Board or the Taluka Local Board because the individual members of the Local Funds Committee before 1869 could not be trustees for a body which was then non-existent. [P 89 C 1]

Hence where a dharmashala and lands were given to a Local Fund Committee before 1869 for management, and the Local Board claimed them as their property by virtue of the Acts of 1869, 1884 and 1923 :

Held that the building and land were possessed by the pre statutory committee for the limited purposes of management and maintenance, and the character of that possession had remained unchanged, and there was no statutory necessity and no necessity in the nature of things for any transfer of the property either of the building or of the land, for the whole duties of the committees and Boards successively charged with the administration of the local funds for the purpose of maintaining dharamashalas could be adequately discharged without their acquiring any lands or buildings in property. [P 90 C 2]

(b) Estoppel — Sale of portion of Government lands by Local Funds Committee when there was no question of ownership—Government though consenters to such transaction held not estopped from claiming ownership in remaining land when such question arises between committee and Government.

A portion of the compound of a dharamshala belonging to Government was sold by the Local Funds Committee at a time when the ownership question did not arise. They were concerned only with the question whether the sale would interfere with the comfort of the travellers. Government were consenters to this and when the question of ownership regarding the remaining portion and the dharamshala subsequently arose between the committee and Government, they claimed ownership :

Held that Government were not estopped from doing so. [P 90 C 1]

J. P. Eddy and T. B. W. Ramsay — *for Appellants.*

Sir Thomas Strangman — *for Respondent.*

Lord Normand. — This is an appeal from a judgment of the High Court of Judicature at Bombay reversing a judgment and decree of the First Class Subordinate Judge at Ahmedabad. The appellants are the District Local Board, Ahmedabad, and the Taluka Local Board, North Daskroi, Ahmedabad. They are the plaintiffs in the suit and they ask for a declaration that a certain area of land, 11,384 square yards in extent, situated at Ahmedabad is their property. The defendant, the respondent, is the Secretary of State. The Subordinate Judge found in favour of the appellants and granted the decree craved, holding that the property in the lands in suit had been transferred by the Government to the Local Fund Committee at Ahmedabad in 1864 and had been thereafter transferred by force of subsequent enactments to the appellants. The High Court held that there was no vesting of the property in the appellants, and further that the respondent was not estopped from denying that the appellants are owners of the land in suit.

The salient facts are not in dispute, and it is upon the legal inference which arises from them that controversy centres. Before 1864 the area in suit, together with other areas later conveyed to a private party, belonged to the Government. On the dis-

puted area there was a dharamshala or bungalow rest house together with out-houses and buildings, all of which were also the property of the Government. In the first half of the 19th century the Government initiated a plan for placing upon local bodies the responsibility for certain local services. Until the year 1869 the Government seems to have been feeling its way, and what was then done was tentative and provisional and lacked clear formulation. About 1862 or 1863 the Government of the Presidency authorized the establishment of local funds for local objects to be managed by a committee of officials and non-officials with the Collector as president, but these arrangements rested upon an informal basis. In 1869 however for the first time the scheme received formal legislative sanction. The Bombay Act No. 3 of 1869 (S. 2) authorized the Government to create in every district a Local Fund Committee, one half of which were to be non-official persons; the Collector or Sub-Collector was to be ex officio president, and the Committee was to act under the control and general supervision of the Revenue Commissioner. All proceedings of the Committee were to be subject to the review and control and final decision of the Government. By S. 3, the Committee was declared to be competent to hold property, moveable and immovable, to convey the same, and to enter into all necessary contracts for the purpose of the Act. S. 4 placed on the Committee the duty of providing for the requirements of the district with respect to inter alia dharamshalas. By S. 6 the Government was authorized to levy a cess for the purposes of the Act, and by S. 9 the net proceeds of this cess were made available to the district local fund. Under S. 10 the Committee were authorized to administer such other funds as might be placed at their disposal by the Government or by private individuals. The Act contains no provision for vesting any property in the Committee and the subsumption of the Act is that there were no pre-existing bodies to which the new statutory committees could be regarded as successors. In fact however a pre-statutory committee at Ahmedabad had the possession in and management of the bungalow built on the disputed lands and of the disputed lands themselves, and of the lands subsequently sold, which together formed the site and compound of the bungalow.

The Act of 1869 was replaced by the Bombay Local Boards Act of 1884. It is here necessary to refer only to S. 41, which enacts that all such immovable and other property as was held by or in trust for any committee under the 1869 Act should vest in the District Local Boards and the Taluka Local Boards established by the Act of 1884. The 1884 Act was in turn replaced by the Bombay Local Boards Act 1923, from which the present appellants derive their powers. It is agreed that if the disputed lands were vested in the Local Funds Committee under the 1869 Act, these lands are now vested in the appellants by force of the Acts of 1884 and 1923. The bungalow and compound were in the possession of the statutory committee and afterwards of the Boards set up by the 1884 Act and are now in the possession of the appellants.

Considerable sums, presumably provided by the Government, were expended on the maintenance of this or other dharamshalas in the district between 1864 and 1878. In 1874 a portion of the lands which formed part of the compound of the dharamshala was sold to a private individual. The conveyance has not been produced in evidence and it is therefore uncertain whether the Local Fund Committee, acting under the statute of 1869 were the grantors. But correspondence and documents which are in evidence show that the "Collector and President, Local Funds Committee," applied to the Revenue Commissioner, Northern Division, for sanction to the sale of this parcel of land and to the crediting of the proceeds to the local funds of the district. Another sale of a further area was made in 1876 in circumstances which are indistinguishable from the sale of 1874. There is produced in evidence an extract from the general index of sheet J, No. 1, of the map of the City of Ahmedabad dated 11th November 1876 with entries showing the lands thus disposed of as private property. But the remaining area on which the bungalow stands is entered as the property of the Government.

In 1908 a lease of the bungalow was granted to the proprietors of the Grand Hotel for a period of 10 years and this lease was renewed in 1918. Again the leases themselves are not in evidence, but an admission is made in the respondent's case that the Taluka Local Board of Ahmedabad, with the sanction of the

Commissioners, Northern Division, let the bungalow to the proprietors of the Grand Hotel. On these facts, the appellants maintain that they or their predecessors, having long been in possession of the bungalow and disputed land, are entitled to the benefit of S. 110, Evidence Act, 1872, which provides that :

> When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

The onus is therefore on the respondent and the crucial question in the case is whether he has discharged it. In the opinion of the Board, agreeing with the learned Judges of the High Court, it is demonstrated that the pre-statutory local funds committees had no power to acquire lands. That power was not conferred on any Local Funds Committee till 1869 when the Act of that year conferred it on the new statutory committees. It necessarily follows that the lands in suit which originally belonged to the Government could not have become vested in the pre-statutory committee in 1864. Nor could they have become vested *vi statuti* in the statutory body created in 1869, for the statute merely conferred upon the new committee a power to acquire lands and transferred no property to it. That is sufficient to dispose of the finding in favour of the appellants made by the Subordinate Judge, who omitted to notice that the pre-statutory committee was not qualified to own land.

Faced with this difficulty, counsel for the appellants put forward an alternative case, which had not been made in the Courts below. He maintained that the lands in suit must be deemed to have been transferred by the Government in 1864 to the individual members of the pre-statutory committee as trustees for that committee, and that the lands had vested by force of S. 41 of the Act of 1884 in the District Local Board or the Taluka Local Board. This contention, even if it were now open to the appellants, is in the opinion of the board without foundation. Under S. 41 of the 1884 Act lands "held in trust for any committee for the purposes of the Bombay Local Funds Act, 1869," vested in the boards set up by the Act of 1884. But it is impossible to hold that the individual members of the Local Funds Committee in 1864 were trustees for a body which was then non-existent.

The argument therefore postulates that in 1864 the Government transferred lands owned by it to certain individuals subject to a verbal trust for behoof of the pre-statutory committee, though at that date the policy of the Government was still experimental and the supposed trust purposes had not been definitely settled and adopted. It further postulates that this verbal trust made provision for the death and resignation of trustees and for all the machinery of trust succession. It assumes without warrant that the trust in some way enured after the passing of the Act of 1869 to the benefit of the statutory committee. It fails to explain why the trust, instead of being terminated by a transfer of the trust property as soon as a competent transferee was created by the 1869 Act, was carried on till vesting automatically took place under S. 41 of the 1884 Act, and it also fails to account for the fact that in 1874 and 1876 there is no mention of the trustees who ex hypothesi alone had a title to convey the lands which were then sold. This alternative case can be dismissed as extravagantly improbable in fact and unmaintainable in law.

The appellants founded on the expenditure upon the bungalow by the successive committees charged with its maintenance, and upon the circumstances attending the sales of portions of the compound attached to it in 1874 and 1876 and the leases granted in 1908 and 1918. They referred to these facts as evidence supporting the inference that the Government had transferred the property in the whole compound to the pre-statutory committee or to trustees in 1864. But as this transfer has been shown to have been a legal impossibility, this aspect of the facts founded on need not be further considered. It remains however to consider the argument for estoppel. The learned Subordinate Judge did not find it necessary to deal with it. In the High Court, it appears to have been based entirely upon the expenditure said to have been laid out on the bungalow. The appellants however now base the argument on the alienation by sale of parts of the compound in 1874 and 1876 and on the leases of the lands in suit in 1908 and 1918. The Board consider that no case of estoppel is established and that the opinion expressed by Broomfield J. in rejecting the case for estoppel pleaded in the High Court is equally applicable to

the case for estoppel now pleaded. The learned Judge says :

> I do not find that there was ever any clear and unequivocal representation by Government that the committee or the board were owners of the land. It is not shown, I think, that any action of the committee was induced by any representation or conduct of the Government.

The conveyances of 1874 and 1876 have not been produced in evidence and it is therefore not established that the Local Funds Committee were the grantors. But even if it be assumed that they were the grantors and that the Government were merely consenters, that would afford no ground for holding that the Government is estopped in a question with the appellants from asserting its ownership of the lands which were not alienated and therefore not dealt with in the conveyances. The correspondence and documents which are produced in evidence are ambiguous and inconclusive. The request for Government sanction to the sale and to the crediting of the proceeds to the local funds was signed by "the Collector and President of the Local Funds Committee". His position illustrates the ambiguity which underlies the whole evidence relative to this matter. The fact is that the question who was the owner of the land which it was proposed to sell did not arise in 1874 or in 1876 and no clear representation by words or conduct was made about it. Moreover, the sales were not induced by any considerations relating to the ownership of the lands. The Government's consent to the sales may have been required either because it owned the lands or because the proceedings of the committee, if it were the owner, were by the Act of 1869 subject to Government review. The consent of the Government to the application of the proceeds of the sale is equally ambiguous. The Government and the committee were concerned not at all with the question of ownership but with the question whether the sale of a portion of the compound would interfere with the comfort of travellers who used the dharamashala. The entries in the general index of the map of Ahmedabad are of much greater significance than the circumstances founded on by the appellants. These entries clearly show that the retained land on which the bungalow stood remained in 1878 the property of the Government.

The circumstances attending the grants of the leases of the bungalow are also equivocal, and no clear representation as to the ownership of the site can be deduced from them. The leases themselves are not produced in evidence, but there is the admission that the Taluka Local Board, with the sanction of the Commissioner, let the bungalow to the proprietors of the Grand Hotel. If however the Taluka Local Board were in possession of the bungalow for the purpose of maintaining it as a rest house, an arrangement by which the Taluka Local Board let it for a term of years to an hotel company with the consent of the Government, is quite consistent with the Government's retention of the property in the bungalow. There is no clear representation by the Government that the Taluka Local Board was owner of the bungalow or its site and the Taluka Board was not induced to alter its position by any such representation. Nothing in the circumstances attending any of these transactions is in any degree inconsistent with the position which the Government took up when the question of the ownership of the disputed lands was raised in 1888. The Government's attitude then was that "the bungalow had been transferred for a specific purpose, but if it ceases to be used for that purpose the right of the Local Board to the use of the compound would cease."

In the opinion of the Board, the bungalow and its compound were in 1864 possessed by the pre-statutory committee for the limited purposes of management and maintenance, and the character of that possession has remained unchanged till this day. The Government has discharged the onus laid on it by S. 110, Evidence Act, by showing that the possession enjoyed by the appellants rests on a basis inconsistent with a right of property. Such plausibility as attaches to the appellants' case depends on ambiguous expressions of opinion or intention given by Government officials at a time when the ownership of the lands in suit was not relevant to the questions under discussion. It ignores the fact that there was no statutory necessity and no necessity in the nature of things for any transfer of the property either of the bungalow or of its compound, for the whole duties of the committees and Boards successively charged with the administration of the local funds for the purpose of maintaining dharmashalas could be adequately discharged without their acquiring any lands or buildings in property. When the Government provided

an existing dharmashala, all that was necessary was that the Local Board should have possession of it for the purposes of management and maintenance. For these reasons, the Board will humbly advise His Majesty in Council that the appeal should be refused and that the judgment of the High Court of Judicature at Bombay should be affirmed and that the respondent should be found entitled to the costs of this appeal.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant—*Nehra & Co.*

Solicitors for Respondent —
Solicitor, India Office.

** A. I. R. 1938 Privy Council 91

(*From Ceylon*)

21st December 1937

LORD THANKERTON, LORD ALNESS AND SIR LANCELOT SANDERSON

C. Sabhapathi — Appellant.

v.

G. Huntley — Respondent.

Privy Council Appeal No. 106 of 1936.

**** (a) Defamation — Privileged occasion — European planter after serious accident treated by Government Medical Officer (plaintiff) of high qualification — Letter by planter about his progress soon after discharge — Fractures subsequently discovered in X-ray examination — Leading specialist unable to diagnose fractures before X-ray — Letter to Director of Medical Services complaining about incompetence and negligence on Medical Officer's part and suggesting his dismissal — Similar letter to Planters' Association which passed resolution in same grave and hurtful terms — Resolution published in newspapers — No opportunity given to plaintiff of offering any explanation — No instance of inattention on his part in the past — Planter also expressing in interview with Director slanderous statements — Letter to Association held not privileged and remarks not justified and actuated by malice — Remarks in interview held privileged but held maliciously made and not protected.**

A European planter, a member of the Planters' Association in Ceylon, was treated at the Government Hospital by a Government medical official of high qualifications who had been for 22 years in Government service and against whom in the past there had been no suggestion of inattention, after the planter had sustained a serious motor accident. After two days, the planter left the hospital and soon after wrote a letter to the Officer informing him that he was doing better. The planter was subsequently examined by a leading specialist who though could not diagnose fractures in his case, advised him to get himself X-rayed. His examination revealed that he sustained fractures. The planter wrote a letter to the Director of Medical Services making hurtful and grave charges about the incompetence, negligence and lack of interest on the part of the medical officer when he had the occasion of being treated by him and even suggesting dismissal. In similar terms the planter wrote to the Planters' Association which passed a resolution condemning the conduct of the Medical Officer. The resolution was published in newspapers. The defendant also saw the Director of Medical Services before whom he made similar slanderous statements. All the statements were found to be not true. The plaintiff was given no opportunity of giving any explanation. The plaintiff filed a suit for defamation against the planter :

Held that the occasion on which the planter penned his letter to the Chairman of the Planters' Association was not privileged. His remarks were not justified as he knew them to be false, and he was actuated by malice. But his statements in the interview with the Director of Medical Services were all made on privileged occasion, though they too were maliciously made and so were unprotected. [P 97 C 2; P 98 C 1]

(b) Practice — Trial Judge is in superior position than Appeal Court to judge of credibility of witnesses on question of fact.

Trial Judge who sees and hears the witnesses is in a superior position to that of the Appeal Court in judging of their demeanour and credibility on a pure question of fact : (*1935*) *A C 243*, *Ref.* [P 95 C 1, 2]

**** (c) Tort — Negligence — X-ray examination is question of circumstances — Mere delay for a week before advising X-ray examination does not per se constitute negligence on part of physician.**

An X-ray examination must always be a question of circumstances depending for example on the condition of the patient, the character of the injuries and the accessibility of the apparatus. Mere delay for a week to await developments before advising an X-ray examination rather than advising such an examination at once per se does not constitute negligence or incompetence on the part of a physician. [P 97 C 1, 2]

*** (d) Defamation — Malice — Finding by trial Judge is question of fact.**

The finding of the trial Judge on the question of malice is a finding of fact. [P 97 C 2; P 98 C 1]

T. Linton Thorp and L. M. D. De Silva — *for Appellant.*

Harold L. Murphy and H. C. Marks — *for Respondent.*

Lord Alness. — This is an appeal from a judgment and decree of the Supreme Court of the Island of Ceylon, dated 9th March 1936, which set aside a judgment and decree of the District Court of Avisawella dated 1st September 1934. These judgments and decrees were pronounced in an action for defamation, in which the appellant was plaintiff, and the respondent was defendant. The District Court awarded the plaintiff a sum of Rs. 10,000 as damages while the Supreme Court dis-

missed the plaintiff's action. The circumstances under which the present suit was brought excluding controversial matter are as follows : The plaintiff is a Bachelor of Medicine and Master of Surgery of the University of Madras, a Licentiate of the Royal College of Physicians, London and a Member of the Royal College of Surgeons, England. He was at all times material to this action employed as the Government District Medical Officer in charge of the Government Hospital at Karawanella and had been in the service of the Government of Ceylon for a period of 22 years or thereby. The defendant was at all material times a member of the Kelani Valley Planters' Association and the superintendent of the Vinoit estate which is situated at Ruanwella in the Kelani Valley District.

On 26th January 1933 the defendant and his wife paid a visit to one Mr. D. S. Urquhart, the acting superintendent of the Panawatte estate which is some 16 miles from the Vinoit estate, and stopped the night with him. On the afternoon of 27th January 1933 the defendant and his wife were being driven home in their car by a chauffeur, when they were involved in a serious accident. The car left the road, fell down a deep slope and overturned. The defendant and his wife were pinned underneath the car. A message was thereupon sent to Mr. Urquhart who arrived in a short time at the scene of the accident in his car. The defendant and his wife were assisted into the car and were conveyed to the Karawanella Hospital. On their way there the car stopped at the plaintiff's bungalow which is close to the hospital. The plaintiff was in his bungalow and being informed of the circumstances of the accident he directed the party in the car to proceed to the hospital. He stated that he would follow them. Beds were prepared with all speed in the hospital for the reception of the defendant and his wife. They were assisted into the building, were undressed and were put to bed. The acting matron of the hospital—Sister Cooper—was in charge of the ward to which the defendant and his wife were admitted. After certain treatment by the plaintiff who followed them to the ward he left the defendant and his wife in charge of Sister Cooper and returned to his bungalow. The defendant and his wife decided not to go home but to remain for the night in the hospital.

Next morning — 28th January — the plaintiff visited the defendant and his wife in the hospital. At that time the acting matron and a friend of the defendant, named Mr. Nicoll who had come to visit them were in the room. The plaintiff visited the defendant and his wife again in the course of the afternoon of 28th January. In so doing he was complying with a rule which required him to visit each patient in a paying ward twice a day. On the morning of 29th January, the defendant and his wife left hospital, and were driven in Mr. Nicoll's car to their home. On 1st February 1933 the defendant wrote and dispatched to the plaintiff a letter in the following terms :

Vinoit,
1st February 1933.

The District Medical Officer,
Karawanella Hospital.

Dear Dr. Sabhapathi,

I will be grateful if you would let me have your own Hospital bills as soon as possible for settlement as we sail so early.

We are both very much better and grateful for the way in which we were looked after at Karawanella.

Yours sincerely,
(Sgd.) G. Huntley.

On 7th February 1933 the defendant had occasion to pay a business visit to Colombo and he was accompanied by his wife. By prior arrangement with Dr. De Silva a leading specialist in the city, he examined the defendant's wife and subsequently the defendant. It is not unimportant to observe that in the course of his examination, Dr. De Silva even at this date did not diagnose fractures either in the case of the defendant or his wife. On Dr. De Silva's advice however both of them were X-rayed by Dr. Gunawardene. His examination revealed that both the defendant and his wife had sustained fractures by reason of the accident. On the advice of Dr De Silva, the defendant and his wife repaired to the Fraser Nursing Home, where they remained for 45 days, and were treated by him. On 13th February 1933, while still in the Nursing Home, the defendant wrote and dispatched to Dr. Brieroliffe, the Director of Medical and Sanitary Services, Colombo, a letter in the following terms :

13th February 1933.

The Director of Medical and
Sanitary Services,
Colombo.

Dear Sir,

I have to make a very strong complaint against the negligence and incompetence of the District Medical Officer at Karawanella.

On Friday the 27th ultimo after a very severe car smash in Panawatte Estate my wife and I and the driver were conveyed by Mr. Urquhart of Panawatte Estate in his car to Karawanella Hospital neither of us being able to move.

We arrived at the Hospital at 8 p. m. and the District Medical Officer after a very perfunctory examination pronounced definitely that no bones were broken and without any suggestion whatever of an X-ray examination in Colombo put us in charge of the acting Matron in the paying ward and actually intimated that we might leave on the following morning.

We stayed two nights as my wife was too unwell to travel, the District Medical Officer making no examination of any sort during that period.

On the 7th instant being able to walk slowly, I took my wife who complained of severe pain in the shoulder into Colombo to see Dr. A. M. De Silva.

He at once ordered an X-ray photo which not only disclosed a fractured arm but a fracture of the pelvis as well and in my own case a fracture below the shoulder. Dr. A. M. De Silva will I know be pleased to furnish full particulars.

Mr. Urquhart of Panawatte Estate can also corroborate my statement re District Medical Officer's treatment at Karawanella Hospital.

I cannot too strongly condemn the attitude of the District Medical Officer whose one examination at night occupied only two or three minutes and thereafter took no interest in us whatever merely prescribing lead lotion and the usual liniment and leaving everything to the acting Matron. My driver was not even given an anti-tetanus injection though I insisted on it for ourselves.

Both my wife and myself are amazed at such behaviour and hope you will take strong action in the matter.

Yours faithfully,

(Sgd.) G. Huntley.

A copy of this letter was also sent by the defendant to Mr. Selwyn, Chairman of the Planters' Association. This the defendant did without giving the plaintiff any opportunity of explaining or justifying his conduct. The letter referred to is the foundation of the plaintiff's claim for damages in the present suit, in so far as it is based on libel. On 21st February Dr. Briercliffe referred that letter to Dr. De Silva for report. On 23rd February 1933, at the annual general meeting of the Kelani Valley Planters' Association at Colombo, the secretary, under direction of the Chairman, Mr. Selwyn, read the defendant's said letter to the meeting. Several members of the Association expressed themselves in strong terms regarding the plaintiff's conduct, and the Association passed a resolution endorsing the terms of the defendant's letter. All this was done without giving the plaintiff any opportunity of being heard in his defence. The defendant's letter, as well as a report of the discussion which ensued, and also the terms of the resolution passed, were published in several newspapers in Ceylon. On 25th February Dr. De Silva replied to Dr. Briercliffe's letter of 21st February. On 27th February the Planters' Association conveyed to Dr. Briercliffe the terms of the resolution passed by them at their meeting. On 1st March the plaintiff wrote to Dr. Briercliffe, expressing his surprise at the published report of the proceedings of the Association, and detailing the circumstances relating to his treatment of the defendant and his wife. On 10th March the plaintiff wrote a further letter to the Provincial Surgeon, at Sabaragamuwa, who was his immediate superior, and the official channel of communication with Dr. Briercliffe. On 16th March the defendant, not having had a reply to his letter from the Director of Medical and Sanitary Services, sent him a reminder, and on 20th March Dr. Briercliffe wrote to the Secretary of the Kelani Valley Planters' Association a letter in these terms :

No. T. A, 1/398.

Office of the Director of Medical and Sanitary Services.

(P. O. Box 500),
Colombo, 20th March 1933.

Complaint against Dr. Sabapathi,
District Medical Officer, Karawanella.

Sir,

With reference to your letter dated 27th February 1933, and my letter No. T. A. 1/398 of 7th March 1933, I have the honour to inform you that I have had the complaints made by Mr. Huntley carefully investigated. When he left the Karawanella Hospital on 29th January Mr. Huntley appears to have been satisfied with the manner in which he and his wife were cared for by Dr. Sabapathi since on 1st February he wrote the following letter :

"Dear Dr. Sabapathi,

I will be grateful if you would let me have your own Hospital bills as soon as possible for settlement as we sail so early.

We are both very much better and grateful for the way in which we were looked after at Karawanella.

Yours sincerely,
(Sgd.) G. Huntley."

2. On 7th February, Mr. and Mrs. Huntley consulted a Surgeon of high professional standing in Colombo, who after a clinical examination, advised that an X-ray examination should be made. I have communicated with this Surgeon, and he informs me that definite diagnosis of the underlying injuries in either patient was not possible without the aid of the X-ray examination.

3. Dr. Sabapathi is of opinion that Mr. Huntley's letter of 13th February is libellous, and he desires to take proceedings. I consider it is regrettable that the letter was publicly discussed at a meeting of your Association on 23rd February and published in the *Ceylon Daily News* on 24th

February, before the allegations had been investigated. It appears to me that Mr. Huntley's allegations of gross neglect and carelessness against Dr. Sabapathi cannot be substantiated, but if a suitable apology were made to Dr. Sabapathi I should advise Government not to allow Dr. Sabapathi to resort to legal action.

4. In para. 2 of your letter referred to above you state "that this would not appear to be an isolated case as during the discussion several other cases were mentioned which would rather point to the complete lack of interest of this officer in his duties, and my Association felt that they must ask you to make a full enquiry into the whole matter and take the necessary action". I shall be obliged if you will bring these or similar cases to the notice of the Provincial Surgeon, Sabaragamuwa.

I am, Sir,
Your obedient servant.
(Sgd.) R. BRIERCLIFFE,
Director of Medical and Sanitary Services.

The Hony. Secretary,
Kelany Valley Planters' Association,
Dabar Estate,
Deraniyagala.

On 7th April 1933, the defendant, at an interview which he had with Dr. Briercliffe, made the following statements to him : (1) that the plaintiff on 27th January had examined the defendant and his wife while they were still in the car, and (2) that the examination in each case lasted only half a minute or so. These statements form the basis of the plaintiff's claim for damages, in so far as slander is concerned. On 8th April 1933, the Director of Medical and Sanitary Services wrote a letter to the Provincial Surgeon, Sabaragamuwa, in these terms :

No. T. A. 1/398.
Office of the Director of Medical and Sanitary Services.
(P. O. Box No. 500),
Colombo, 8th April 1933.

Complaint against Dr. Sabapathi,
District Medical Officer, Karawanella.

Sir,

With reference to your Endorsement R. 483 of 15th March 1933, I have the honour to inform you that a deputation consisting of the Chairman, Kelani Valley Planters' Association, Mr. Nicholls and Mr. Urquhart together with Mr. Huntley discussed with me the case of Mr. and Mrs. Huntley, on the 7th instant.

Certain of their statements do not agree with para. 3 of Dr. Sabapathi's letter of 1st March. Mr. Huntley stated and Mr. Urquhart confirmed what he said, that Dr. Sabapathi examined Mr. and Huntley while they were still in the car.

During this examination, Dr. Sabapathi felt and moved their arms and assured them that no fractures were present; and the examination in each case, lasted only half a minute or so. The patients were afterwards assisted to get out of the car and into the paying ward in order that they might be given injections of anti-tetanus serum. Mrs. Huntley then said she was unable to go further and Mr. Huntley suggested that they should stay the night there. There was one bed in the ward and another bed was brought for Mr. Huntley. When the patients were in bed and some of their clothing had been removed, Dr. Sabapathi again examined them but this time he looked only for cuts and bruises and did not touch or re-examine the arms or shoulders of their patient for fractures. They consider therefore that Dr. Sabapathi did not make a sufficiently careful or reasonable examination on which to give the definite assurance (which he repeated on several occasions) that no bones were broken. As these statements conflict with Dr. Sabapathi's account, I shall be obliged if you will request Dr. Sabapathi to explain the discrepancies.

I am, Sir,
Your obedient servant,
(Sgd) R. BRIERCLIFFE.
Director of Medical and Sanitary Services.

The Provincial Surgeon.
Sabaragamuwa Province,
Ratnapura.

The plaintiff on 15th April wrote the following letter to the Provincial Surgeon:

The District Hospital,
Karawanella, 15th April 1933.

The Provincial Surgeon, Sabaragamuwa,
Ratnapura.

Sir,

Referring to your T. 1585 of 10th April 1933 and of D.M. & S.S.'s T.A.1/398 of 8th April 1933, I have the honour to submit the following :

1. The statement in para. 3 of my letter of 1st March 1933 is a correct account of what transpired on the evening of 27th January last.

2. There was no examination of Mr Huntley or Mrs. Huntley by me when they were in the car. The statement that I examined them in the car is not true.

3. There was a careful and complete examination of Mr. and Mrs Huntely after they were put in beds in the ward. That the examination and treatment given to them left nothing to be desired is shown by the letter written to me by Mr. Huntley himself on 1st February 1933, when the facts were fresh in Mr. Huntley's mind and when there was no reason for him to state anything but the truth.

4. After examining the patients with due diligence, I immediately recorded in the bed head ticket of both the patients, the injuries and other particulars which I observed and put in writing my opinion in both the bed head tickets as follows :

" No evidence of fracture ".

5. I expressed the same opinion orally to the patients

6 I annex herewith copies of three statements for your information as to what transpired that evening.

I am, Sir,
Your obedient servant,
(Sgd.) C. SABAPATHI.
District Medical Officer, Karawanella.

Appended to the plaintiff's letter were three sworn statements by the acting Matron of the hospital, and two other witnesses, named De La Harpe and Hassim. On 21st December 1933, the plaintiff, having obtained the necessary permission, filed the present suit against the defendant, the

defendant filed an answer, and certain issues were adjusted for the trial. The case was heard by Mr. Vytilingham, the District Judge of Avisawella, without a jury, and he, on 1st September 1934, issued judgment in favour of the plaintiff. He accepted his evidence and that of his witnesses as true. He disbelieved the defendant and several witnesses whom he had adduced. He held that the defendant's plea of justification was not made out. The learned Judge further held that the defendant's communication to the Planters' Association was not made upon a privileged occasion, but he also held that if, contrary to his opinion, it was a privileged occasion, the defendant was actuated by malice in making the communication. The defendant appealed to the Supreme Court of Ceylon, and they, on 28th November 1934, sustained the appeal and dismissed the plaintiff's suit. The Supreme Court held that the defendant's plea of justification had been established. They further held, agreeing with the trial Judge, that the communication of the plaintiff's letter to the Planters' Association was not in the circumstances made on a privileged occasion, but, differing from the trial Judge, that the communication was not maliciously made. From that judgment this appeal has been taken by the plaintiff to His Majesty in Council.

There is no dispute between the parties that the written and verbal statements attributed by the plaintiff to the defendant were made by him, nor is there any dispute that those statements were in the one instance libellous and in the other instance slanderous and actionable, unless they were proved to be true or were written and spoken on privileged occasions without malice. The first question which arises accordingly is—has the defendant's plea of justification been made out? The trial Judge in reply to that question said—No. The Supreme Court said—Yes. It appears to their Lordships that the defendant, in seeking to establish his plea of justification, is confronted by certain initial difficulties, which are certainly grave, and which may prove to be insurmountable.

(1) The establishment of the defendant's plea involves the reversal of the judgment of the trial Judge, who saw and heard the witnesses, and who was thus in a superior position to that of the Appeal Court, in judging of their demeanour and credibility on a pure question of fact. This is at all times a difficult enterprise for a litigant to undertake : *cf.* (1935) A C 243.[1] Moreover the Judge of first instance in this case, despite some slips which he made in disposing of the case—and these, in the circumstances, are not surprising—and which were quite properly emphasized by the defendant's counsel, has written a careful and painstaking judgment, which is deserving of full consideration and respect.

(2) The statements made by the defendant in his letter to the Planters' Association, and at his interview with Dr. Briercliffe, regarding the plaintiff's incompetence and negligence are antecedently improbable. It must be remembered that their Lordships are concerned with a responsible public official who had been for 22 years in Government service, and against whom in the past no suggestion of inattention, far less of incompetence and negligence, had been made. Moreover, the plaintiff, on the occasion in question, was dealing with a European planter as a patient who, to the knowledge of both parties, had sustained a serious accident; and it is in evidence that members of the Planters' Association are not slow to make complaints of medical inattention on the smallest provocation. Finally, under this head, there is a complete absence of motive or explanation suggested by the defendant to account for the lapse from care and skill on the part of the plaintiff which is attributed to him.

(3) Again, the sweeping character of the allegations made by the defendant in his letter to Dr. Briercliffe, and at his subsequent interview with him, prima facie render them difficult to justify. Incompetence, negligence, lack of interest—all these are attributed by the defendant to the plaintiff. Whether these allegations be general in their character, or are limited to the occasion in question—and their Lordships are disposed to take the latter view—it is manifest that the charges are hurtful and grave. The most significant commentary upon them is made by the defendant himself, at the close of his letter, when he expresses the hope that the Director will take "strong action" in the matter, and when, in evidence, he said that he hoped that an incompetent man like the plaintiff should be removed (record p. 39).

1. Powell v. Streatham Manor Nursing Home, (1935) A C 243=104 L J K B 304=152 L T 563=79 S J 179=51 T L R 289.

(4) Lastly, it is difficult to escape from the conclusion that the affirmation of the defendant's plea of justification postulates, upon the plaintiff's part, not only perjury, but conspiracy as well. For, if the defendant is right, not only the plaintiff, but nurse Cooper—to whose demeanour and credibility as a witness the trial Judge awards a high certificate—De La Harpe and Hassim—whose evidence the trial Judge accepted as true—must be regarded as parties to a plot to bolster up the plaintiff's claim, to deceive the Court, and to frustrate the ends of justice. On the other hand, the main witness on the other side is the defendant himself, and it is not only charitable but indeed probable to suppose that the serious accident which he sustained, with its consequent shock, may have tended to impair his recollection of some at least of the events which ensued. He states in evidence that "on some points I am quite clear, and on other points I am not" (p. 35).

Coming to closer quarters with the case, and surveying the evidence adduced—and their Lordships may say that, in the circumstances, they consider themselves absolved from a meticulous examination of it—there are certain incidents which seem to afford a touchstone *hinc inde* of the truthfulness of the witnesses concerned. Their Lordships propose to refer to two of these. The case for the defendant now is that the plaintiff, on 28th February, examined him and his wife in the car before they were admitted to the hospital, and that thereafter there was no examination of them by the plaintiff in the hospital. The Supreme Court, in their judgment, it may be noted, refer to the fact that the defendant "for some inexplicable reason seems to have persisted in saying that there was no examination in the ward at all." (p. 180.) The only witnesses who depose to the examination in the car are the defendant, and his friend Mr. Nicoll. On that evidence two preliminary observations may be made. The first is that it seems prima facie improbable that the plaintiff should in the car conduct an examination of his patients, in an imperfect light, and in difficult circumstances, seeing that they were about to be admitted to the hospital ward, where a full and satisfactory examination would be possible. The second observation is this — that the defendant did not suggest, in his letter of 13th February, that an examination by the plaintiff in the car had taken place, and indeed did not suggest it till the interview which he had with the Director of Medical and Sanitary Services on 7th April 1933. It would appear to be an afterthought. However that may be, their Lordships have no hesitation in preferring, in this regard—as the learned trial Judge did — the evidence of the plaintiff, Hassim and De La Harpe to the evidence of the defendant, whom on this point, the trial Judge did not believe, and the evidence of Mr. Nicoll. It may be noted that Hassim and De La Harpe, in examination-in-chief, affirmed in terms that there was no examination of the defendant and his wife by the plaintiff in the car, and that they were not cross-examined on that evidence. If the alleged examination of the defendant and his wife in the car be not only an afterthought, but an untruth, then that conclusion cuts, in their Lordships opinion, very deep into the defendant's case.

But there is another and even more significant consideration, and that is the evidence afforded by the bed head tickets. These are contemporaneous records of the treatment received by the defendant and his wife as inmates of the hospital ward at the hands of the plaintiff. The bed tickets were filled in by the secretary of the hospital, the acting matron, and the plaintiff. There is no suggestion made that these tickets are not bona fide or that they were subsequently tampered with, and they may and indeed must be accepted at their face value. What do they disclose ? They disclose, contrary to the defendant's allegation, a course of normal, competent and careful treatment of the defendant and his wife. They disclose—again contrary to the defendant's allegation — that the plaintiff's diagnosis was—not "no fractures"—but "no signs of fracture"—a very different thing. They disclose — contrary to the defendant's allegation — that the plaintiff visited the defendant and his wife on the morning of 29th January before they left the hospital. In short, it is not too much to say, that, in their Lordships' opinion, the bed head tickets are largely destructive of the defendant's case.

Their Lordships now pass to consider briefly what may be termed the medical aspect of the case. The pivotal charge which the defendant, in the end of the day, made against the plaintiff is that he

failed at the time to recommend the defendant and his wife to undergo an X ray examination. Now their Lordships think it clear that, until an X-ray examination of the defendant and his wife was made in Colombo on 7th February — an examination which disclosed fractures in both cases — it had not occurred to the defendant to make any charge against the plaintiff. Indeed his letter to the plaintiff, dated 1st February 1933, which has been already quoted, records marked improvement in the condition of the defendant and his wife, and expresses appreciation of and gratitude for their treatment by the plaintiff and his staff while in hospital. And in evidence the defendant states : "Till the fractures were discovered, I thought that Dr. Sabapathi's examination was an ample one" (p. 42).

In any case, the charge which the Supreme Court has affirmed against the plaintiff, and upon the affirmation of which they regard his negligence and incompetence to be established, was his failure to advise an X.ray examination of the defendant at the time (p. 186, line 36). The proposition affirmed by the Supreme Court would seem to run thus — After a motor car accident, the attending physician must advise resort to a radiologist, and, if he omits to do so, he displays both incompetence and negligence. The proposition is simple in statement, but is not so simple in solution. Their Lordships think that, as stated by the Supreme Court, the proposition is far too wide. An X.ray examination, their Lordships apprehend, must always be a question of circumstances — depending, for example, on the condition of the patient, the character of the injuries, and the accessibility of the apparatus. In this case, the defendant's leading and indeed only medical witness, Dr. De Silva, in his report, dated 25th February 1933, said :

> Taking into consideration the interval of time that had elapsed between the accident and the time of examination of the patients by me eleven days) it is difficult for one to pronounce an opinion as to their condition at the time of the accident.

The plaintiff's position in the matter seems to their Lordships to have been clear and consistent throughout. He found, on examination of his patients, no evidence of fracture. He allowed them to go home, instructing them to let him know how they progressed. Had their pain and other symptoms continued unabated for a week, he would no doubt have advised an X-ray examination. When however the plaintiff received a letter from the defendant stating that he and his wife were "much better," it is not surprising that he concluded that the worst was past, or that assuming as he did, that they were carrying out their avowed intention of going to Europe, he thought no more of the matter. It is not unimportant to observe that no witness adduced for the defendant affirmed in terms that delay for a week, to await developments, before advising an X.ray examination, rather than advising such an examination at once, per se constitutes negligence or incompetence on the part of a physician. And yet such is the basis of the judgment of the Supreme Court against the plaintiff.

Their Lordships are in these circumstances clearly of opinion that the defendant's plea of justification fails. That being so their Lordships are absolved from considering the apparently difficult question of whether, according to Roman-Dutch law, which obtains in Ceylon, the defendant's statements were not only true, but were made "for the public benefit". On that question the existing law would appear, from the argument which their Lordships heard, to be far from clear, and on it their Lordships offer no opinion.

It only remains to consider (1) whether the occasion on which the defendant penned his letter to the Chairman of the Planters' Association was privileged, (2) if it was, whether the defendant acted maliciously in the matter, (3) whether the statements made by the defendant to Dr. Briercliffe, at the interview of 7th April 1933, were made on a privileged occasion, and if the occasion was privileged, whether the statements were made maliciously.

(1) Agreeing with both Courts below, their Lordships are of opinion that, in the circumstances disclosed in evidence, the occasion was not a privileged one. (2) Their Lordships are further of opinion—agreeing with the trial Judge—that the defendant was actuated by malice when he wrote the letter in question. He must have known that its terms were false. The finding of the learned Judge of first instance on the question of malice is a finding in fact. The state of a man's mind, as has been said, is as much a fact as the state of his digestion. Their Lordships see no rea-

son for disturbing the finding of the trial Judge on this question of fact. (3) Their Lordships are of opinion, agreeing with the Supreme Court, that the statements made to Dr. Briercliffe by the defendant, at the interview of 7th April were made on a privileged occasion, but as already indicated, they are of opinion that they were maliciously made, and are therefore unprotected.

It was admitted by the defendant's counsel that in the event of the success of the plaintiff's appeal he did not desire to dispute the quantum of the damages awarded by the trial Judge. Their Lordships will humbly advise His Majesty that the plaintiff's appeal should be allowed, the judgment and decree of the Supreme Court set aside, and that the judgment of the trial Judge should be restored, with costs here and in the Courts below.

V.B.B./R.K. *Appeal allowed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondent —
Stephenson, Hardwood & Tatham.

A. I. R. 1938 Privy Council 98

(*From Oudh*)

21st December 1937

LORD RUSSELL OF KILLOWEN, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mahant Har Kishen Das — Appellant.

v.

Satgur Prasad — Respondent.

Privy Council Appeal No. 42 of 1936, Oudh Appeal No. 2 of 1934.

(a) Execution — Decree binding.

In execution proceedings, the question as to whether the view of the Court which passed the decree is right or wrong is no longer open : *8 Cal 51 (P C) and 6 All 269 (P C), Rel. on.*

[P 100 C 2]

(b) Life-Estate — Life-tenant of immovable property—Right in rents and profits.

A tenant for life of immovables has not merely a limited interest in the rents and profits which have accrued in his lifetime but is complete owner thereof. [P 102 C 1]

(c) Deed — Construction — Agreement by which *N* to be owner and in possession of immovable property for life—On his death *S* to own and possess entire moveable and immovable property — *S* held was not constituted general heir of *N* so as to be entitled to all property which *N* might possess at time of death — Agreement held should be construed with reference to property then in existence.

The material clauses in an agreement ran as follows :

N shall remain owner and in possession of the immovable property, taluqdari and non-taluqdari, for his lifetime, without the power of transfer in any form. After the death of *N*, *S* shall own and possess the entire moveable and immovable property taluqdari and non-taluqdari. Subsequent to this agreement *N* obtained a money decree against *S* and pending execution *N* died. *S* contended that by virtue of the agreement *N*'s right had vested in him and the decree was not capable of execution :

Held that the words "entire moveable and immovable property taluqdari and non-taluqdari" in the agreement could not be stretched to cover all property, whatsoever, which *N* might acquire; or which he might acquire out of the interest conferred on him by the agreement ; or even all property which he might possess at the time of his death. It was no part of the purpose of the agreement, to constitute *S* the general heir of *N*. The agreement must be construed with reference to property then in existence. *N* could have validly made an alienation inter vivos or testamentary disposition of his interest in the decree. And if he had not so alienated, his heir was entitled to it. [P 102 C 1, 2]

L. P. E. Pugh and W. Wallach — *for Appellant.*

A. M. Dunne and J. E. Godfrey — *for Respondent.*

Sir George Rankin.—This consolidated appeal arises out of execution proceedings in the Court of the Subordinate Judge at Bahraich to enforce a certain provision in a decree made on 28th November 1927, by a Judge of the Chief Court of Oudh in its original jurisdiction. This decree had been modified as a result of appeals to that Court in its appellate jurisdiction and to His Majesty in Council. The decree of the Appellate Bench is dated 2nd May 1928, and the judgment of the Board was delivered on 18th January 1932 [59 I A 147[1]]. The suit in which the decree was passed was brought on 21st February 1927, by Mahant Har Narain Das (in this judgment referred to as Narain Das) against the present respondent, whom their Lordships will refer to as Satgur Prasad, and two other persons. The plaintiff's case in outline was as follows :

For many years there had existed in the City of Lucknow a sangat or Udasi shrine to the mahant of which valuable taluqdari property and certain other property moveable and immovable belonged. This institution had been founded by one Baba Hasara in the eighteenth century or earlier ; and at the annexation of Oudh

1. Satgur Prasad v. Har Narain Das, (1932) 19 A I R P C 89=136 I C 103=59 I A 147=7 Luck 64 (P C).

the taluqa had been granted to the then mahant (Gur Narain Das) by a primogeniture sanad and entered in lists 1 and 2 prepared under S. 8 of Act 1 of 1869 (The Oudh Estates Act). The other immovable properties had been acquired by the succeeding mahant (Har Charan Das) who died in 1910 and was succeeded as mahant by one Sant Rain Das. When Sant Rain Das died on 8th January 1922, the plaintiff succeeded him as gurubhai, i. e. as having been with him a chela of his guru Har Charan Das ; but claims to succeed to the property were made by Sheoraj Kuer, mother of Sant Rain Das, and also by the respondent Satgur Prasad (then aged about 16 years). The claim made for the latter was that he had been chela to Sant Rain Das and was entitled therefore to be mahant. This dispute was compromised by an agreement dated 20th January 1922, which in substance provided that the plaintiff should hold the properties for life, and Satgur Prasad should be remainder-man. In 1924 however the respondent Satgur Prasad induced the plaintiff to enter into an agreement dated 25th November 1924 whereby the whole of the properties were released to the respondent on the terms (inter alia) that the plaintiff would receive a monthly allowance of Rs. 1000. Under this agreement the respondent, in addition to the immovables, obtained possession of the cash at the banks and estate treasuries together with the proceeds of War Bonds and other effects. The amount of money so obtained by the respondent was specified (in Sch. C of the plaint) as amounting to over two lacs of rupees. [For the purposes of the present case two items fall to be deducted and the amount may be taken as Rupees 1,83,000.]

The plaint alleged that by the agreement of 20th January 1922, the respondent was to succeed the plaintiff as mahant and was to become and behave himself as a Udasi and to appoint a successor of that sect, but that the respondent had violated these obligations and had failed to pay the plaintiff's monthly allowance. Also that the plaintiff's consent to the agreement of 25th November 1924, had been obtained by the fraud and undue influence of the respondent and his co-defendants. By the decree (28th November 1927) of the trial Judge (Pullan J.) the deed of 25th November 1924, was set aside, and the plaintiff was held entitled to possession of the immovable properties mentioned in Schs. A and B to the plaint as well as of the properties in Sch. C and to mesne profits (to be subsequently ascertained). A declaration was also made that the respondent was not entitled to any benefit under the agreement of 20th January 1922 ; but this declaration was set aside by the Appellate Bench. The appellate decree (2nd May 1928) affirmed the relief given as to the agreement of 25th November 1924, and the order for possession of the properties in Schs. A, B and C of the plaint, but determined that mesne profits were to be calculated as from the date of the suit (21st February 1927) and not from the date of the agreement. The question as to the date from which mesne profits should be calculated was the only point on which the appellate decree was modified by His Majesty in Council in 1932.

Meanwhile the plaintiff having obtained possession of the immovable properties, applied on 6th January 1931, to the Subordinate Judge of Bahraich for execution of that part of his decree which was expressed (incorrectly) as a decree for possession of the properties in Sch. C to the plaint, but which was really a simple money decree for the value thereof. As already mentioned, this was limited to the figure of Rs. 1,83,000. The Court was asked to attach and sell the interest of the respondent under the agreement of 20th January 1922, in certain villages in the Ranipur Estate and neighbourhood within the district of Bahraich. The respondent filed objections which the Court dismissed on 26th May 1933. He thereupon appealed to the Chief Court on 25th August 1933, [Execution Appeal No. 52 of 1933] and his appeal was pending when on 26th December 1933, Narain Das, the decree holder, died. The controversy in the present case is entirely concerned with the effect of the death of Narain Das upon the respondent's liability under that part of the decree which awards the sum of Rs. 1,83,000, as due from him. The respondent's contention is that the right of the decree-holder has passed to himself, the judgment-debtor. On 13th February 1934, he applied to the Chief Court [Miscellaneous Application No. 92 of 1934] raising this contention and asking that the appellant now before their Lordships (Har Kishen Das, who will be referred to as Har Kishen) be made a party to his appeal as a person claiming to be entitled to the

benefit of the decree. The Chief Court by two decrees dated 3rd May 1934, have accepted the respondent's contention, have held that the decree can no longer be put in execution since the decree-holder's right has vested in the judgment-debtor, and have accordingly allowed the respondent's appeal from the Subordinate Judge's order of 26th May 1933. Hence these two appeals by Har Kishen which have been consolidated.

The case of the respondent was that the right to the benefit of the decree of 28th November 1927, as regards the sum of Rs. 1,80,000, in respect of the moveables referred to in Sch. C of the plaint had on the death of Narain Das vested in the respondent by virtue of the terms of the agreement of 20th January 1922. The Chief Court has found in his favour by upholding his construction of that instrument the general effect of which was to leave Narain Das in possession for his life and to give a vested remainder to the respondent. Before the Board a further ground of claim has been suggested for the respondent, namely that he is now the mahant of the sangat or (more correctly, perhaps) the general heir of Narain Das entitled to succeed to his moveables not otherwise disposed of by him.

The appellant Har Kishen makes an over-riding claim to the effect that the sangat is a religious endowment, that Narain Das as mahant was merely manager of properties impressed with a trust for the objects of the endowment, and that the agreement of 20th January 1922, was accordingly invalid. He claims that on the death of Narain Das the person duly appointed to the office of mahant was himself, and that he is entitled to recover the funds of the endowment so as to apply them to their proper objects. For this he has brought a suit [No. 3 of 1934] in the Chief Court which though dismissed by the trial Judge is now pending in appeal. The second claim of the appellant Har Kishen is that he is entitled to the benefit of the decree under execution by reason of a registered will dated 28th December 1931, whereby Narain Das expressly bequeathed to him all decrees which stood in the testator's name. His third case is that Narain Das had disposed of the decree and of other effects by an oral dedication for religious and charitable purposes and by a written instrument executed shortly before his death had appointed the appellant and other persons as trustees thereof. Their Lordships think it necessary to put on the one side all argument which proceeds upon the footing that the property in question belongs to a religious endowment and that the mahant is a mere manager or trustee of its fund. This contention was expressly raised by Narain Das at the trial as Issue 5. It was disputed by Satgur Prasad and the trial Judge upon careful enquiry into the facts held that

> the property in suit cannot be regarded as appurtenant to the sangat of Baba Hasara but it is the absolute property of the mahant for the time being as a taluqdar under Act 1 of 1869.

The Appellate Bench note in their judgment :

> The trial Court rejected this case of the plaintiff and found that the estate in suit was held by Mahant Guru Narain Das in his own right without any obligations of a religious trust and that the incidents of an estate as defined in Act 1 of 1869 are applicable to it. This finding of the learned Judge was not questioned before us by learned counsel for the plaintiff-respondent and is therefore agreed to by both sides.

The view accepted by the Courts and by the parties was in effect that the taluqdari estate must be held to fall under that provision in Act 1 of 1869 [Cl. (2) of S. 22] which allows succession in default of an agnate to such person as would be entitled to succeed by the personal law (including custom) of the taluqdar — in this case by the guru-chela method of succession. Whether this view of the matter be right or wrong, their Lordships think that in these execution proceedings under the decree of 28th November 1927, the question is no longer open : 8 I A 123[2] and 11 I A 37[3] at p. 41. It may or may not be that the appellant or the respondent has become mahant of the sangat, but neither can be heard to lay claim in that capacity to the benefit of the decree as regards the sum of Rs. 1,80,000 on the ground that it is part of the trust property of an endowment. The Chief Court has rightly ruled out the appellant's objection taken on that ground and he must be left to prosecute it in the suit he has already brought for the purpose.

The next point for decision is whether or not the respondent Satgur Prasad can

2. Mungul Pershad Dichit v. Grija Kant Lahiri, (1882) 8 Cal 51=8 I A 123=11 C L R 113=4 Sar 248 (P C).
3. Ram Kirpal Shukul v. Mt. Rup Kaur, (1884) 6 All 269=11 I A 37=1886 A W N 286=4 Sar 89 (P C).

validly claim the benefit of the decree for Rs. 1,80,000 as a matter of construction of the agreement of 20th January 1922. That agreement purports to be a settlement of disputes in respect of the six portions of taluqa Maswasi lying in six districts of Oudh "as well as of non-taluqdari and moveable property." The disputants as already noted were Narain Das (aged about 60), the respondent (aged 16) for whom his father was acting, and Mt. Sheoraj Kuer, mother of the last mahant Sant Rain Das, and of Rup Kuer, the respondent's mother. The agreement contains provision for the education and maintenance of the respondent by Narain Das and for his assisting the latter in the management of the property when he comes of age ; and for Rs. 50,000 being invested for his benefit. It provides that Sheoraj Kuer is to get the cash in a certain safe and Rs. 8000. It provides maintenance for Sheoraj and allowances for her daughter Rup Kuer, her husband and family. The important clauses for the present purpose are as follows :

1. This entire taluqa property is governed by Act 1 of 1869, and shall always remain governed by the said Act and the person in possession thereof for the time being shall be deemed as taluqdar.

2. The first party, Mahant Har Narain Das, shall remain owner and in possession of the immovable property, taluqdari and non-taluqdari, for his lifetime, without the power of transfer in any form.

4. After the death of Mahant Har Narain Das the first party, Satgur Prasad, the third party, who is called Baba Hari Saran Das, shall own and possess the entire moveable and immovable property, taluqdari and non-taluqdari.

5. Because Baba Hari Saran Das belongs to the same order of Udasi Nanakshahi to which Mahant Gur Narain Das deceased, the first taluqdar (also) belonged and (as) hitherto the successors of the said Mahant have belonged to the same order, it shall be the bounden duty of Baba Hari Saran Das, the third party, to appoint one belonging to the same order as his successor and he (Baba Hari Saran Das, the third party) shall have no power to appoint anyone of a different order as his successor: and the same mode of succession, governed by Act 1 of 1869 shall always be maintained.

9. As to the moveable property, it has been settled that Mahant Har Narain Das, the first party, shall be the owner of the whole except the following property : (a) Mt. Sheoraj Kuer, the second party, shall be the owner of the entire cash locked in the iron safe at the bungalow in Bagh Baba Hazara as well as of the entire jewellery and clothes. (b) Out of the money in deposit in the Bank and invested in War Bonds and United Provinces Loan Bonds, War Bonds, United Provinces Loan Bonds and cash, of the value of Rs. 50,000, shall be deposited in any Bank in the name of Baba Hari Saran Das, and Baba Hari Saran Das, the third party, shall have no power to alienate the same. Mahant Har Narain Das shall, at the proper time, cause immovable property to be purchased in the name of Baba Hari Saran Das, the third party, out of the said amount and pending such purchase, interest on the said money shall continue to be deposited in the name of Baba Hari Saran Das. (c) Out of the remaining cash, the first party, Mahant Har Narain Das, shall set apart Rs. 20,000 for Bhandara (giving feast to sadhus) in honour of Mahant Har Charan Das. (d) Out of the remaining money Rs. 60,000 shall be set apart for a marble tomb (Samadh) of Mahant Sant Rain Das deceased, and Mahant Har Narain Das shall commence its construction within six months. (e) Out of the remaining money, Mahant Har Narain Das, the first party, shall give Rs. 8000 to Mt. Sheoraj Kuer, the second party.

The question is : does this agreement carry to the respondent the decree for Rs. 1,83,000 on the death of Narain Das ? Whether the decision that the property was the absolute property of the mahant be right or wrong it will be noticed that this is the footing upon which the agreement proceeds. Two persons having conflicting claims to be manager or trustee of a religious endowment can hardly adjust their dispute by dividing the property between themselves. Clauses 1 and 5 are entirely consistent with the view taken by the Chief Court. They do show however —as is indeed otherwise apparent—that it was contemplated that the respondent would succeed Narain Das as a mahant of the sangat and as his successor under the Oudh Estates Act. This could only happen by application of the guru-chela principle which in the events contemplated would make the respondent the general heir of Narain Das. This has a double bearing upon the question before their Lordships : (a) it may have an effect upon the proper construction of the agreement of 20th January 1922 ; (b) if in fact and in law the respondent did become the successor and heir of Narain Das according to the personal law applicable to him this may be a ground of claim by the respondent dehors the agreement.

The construction of the agreement does not seem to present difficulty save for the words "moveable and" in the concluding phrase of clause 4. Cl. 2 gives Narain Das a life-estatei n the immovable property. Cl. 9 makes him owner of the moveable property or rather what is left thereof after satisfying thereout the heavy requirements of sub-cls. (a) to (e). It seems to be quite impossible to construe cl. 9 as giving to Narain Das a life-estate in the

moveables by its use of the word "owner". As is emphasized by its use in sub-cl. (a) this word is used in the ordinary sense in which it is applicable to moveables and by sub-cl. (b) Rs. 50,000 out of the moveables has been set aside for the respondent. Cl. 9 however is concerned only with assets then existing. Prima facie, at least cl. 4 would appear as regards the immovables to deal with the remainder expectant upon the determination of the life interest given by cl. 2 in the existing property; but to find a meaning for the reference to moveables in this clause is by no means easy. The Chief Court held that "owner" in cl. 9 meant "owner for his lifetime only" and that cl. 4 gave to the respondent a remainder-man's estate in the moveables. Further they held that the agreement gave the respondent a similar estate in remainder in rents and profits accruing in the lifetime of Narain Das and indeed in all future acquisitions of moveable or immovable property. In one passage they treat the agreement as including a settlement of future property and in another they say:

> Rents and profits of an estate are incidents of that estate, and they must go with the estate. Mahant Har Narain Das's interest therefore in such rents and profits must be taken to have been the same as in the estate itself, that is to say, a life-interest.

On this view of the agreement the Chief Court have reached the conclusion that Narain Das had no power to make either an alienation inter vivos or a testamentary disposition of his interest in the decree for Rs. 1,83,000. Their Lordships cannot accept the views of the Chief Court as to the nature of a life-estate in immovable property; they discern no merits in the novel doctrine that a tenant for life of immovables has only a limited interest in the rents and profits which have accrued in his lifetime and is not complete owner thereof. With great respect to the learned Judges their Lordships consider that the cases cited in support of their opinion have been misapplied to the agreement in the present case.

"The entire moveable and immovable property, taluqdari and non-taluqdari" in cl. 4 of the agreement, cannot in their Lordships' opinion be stretched to cover all property whatsoever which Narain Das might acquire; or which he might acquire out of the interests conferred on him by the agreement; or even all property which he might possess at the time of his death. It was no part of the purpose of the agreement, as their Lordships construe it, to constitute the respondent the general heir of Narain Das, still less so to do this as to defeat the latter's right to leave the smallest legacy by will or to deal with accrued rents and profits as in his lifetime he might desire. The words "moveable and" in cl. 4 like the rest of the clause must be construed with reference to property then in existence, and their Lordships are not satisfied to give to them any effect in construction which is repugnant to cl. 2 or cl. 9. The words on this footing are not necessarily insensible: if the qualification "taluqdari and non-taluqdari" applies to them they may just possibly refer to moveables connected in some special manner with the estate, e. g. bonds in connexion with loans to tenants against rent, or growing crops. On this their Lordships make no decision. The general structure of the agreement and the opening words of cl. 9 give some ground for the opinion that the words in question were put in by some confused afterthought. In any case the utmost weight that can be given to the circumstance that the respondent was intended to become chela to Narain Das and in this manner to be his successor will not in their Lordships' view justify a construction which on the death of Narain Das would carry to the respondent his interest in the decree of 28th November 1927 so far as regards the sum of Rs. 1,83,000. The cash and war bonds obtained by the respondent from Narain Das under the agreement (voidable and in due course avoided) of 25th November 1924 are not shown or alleged to have been assets in existence in January 1922. All that is known or need be known about them is that they were the property of Narain Das and they must be taken in the present proceedings to have been his own property in the ordinary sense. Whether or not the respondent or the appellant can show that he has succeeded to the office of mahant of the sangat or as the heir to Narain Das by virtue of the guru-chela principle, the respondent's application and appeal must fail if it be shown either that Narain Das in his lifetime created a trust in respect of the interest now sought to be enforced in execution or that he effectively disposed of it by will. For the correct disposal of the case it is necessary to decide these questions. The Chief Court have noted that the respon-

dent admitted before them the genuineness and execution of the alleged will; this may or may not remove all difficulty on that claim.

Their Lordships will humbly advise His Majesty that the order to be made on this appeal should direct as follows: That this apppeal be allowed: that the two decrees dated 3rd May 1934 be set aside save as regards the provision in the decree in Appeal No. 52 of 1933 whereby Rs 500 was awarded to Satgur Prasad as costs of an adjournment; that the case be remanded to the Chief Court of Oudh (a) to decide (1) whether Narain Das in his lifetime made a valid disposition of his rights in the decree under execution so far as regards the Rs. 1,83,000 now in question, (2) if not whether he did so by his will dated 28th December 1931, (3) if not who is entitled to succeed to the moveable property of Narain Das as his heir; (b) to determine accordingly who is now entitled to the benefit of the decree dated 28th November 1927 in respect of the said sum of Rs. 1,83,000 and whether the said decree can no longer be enforced against the respondent by reason that he is entitled to the benefit thereof; if not, who are the persons proper to be substituted as respondents to execution appeal No. 52 of 1933 depending in the Chief Court; (c) what is the proper decree to be made in respect of that appeal. That for the purposes (a) and (b) aforesaid the Chief Court do either take evidence or if it thinks fit frame issues and send them to be investigated by such other tribunal as in the exercise of their appellate powers they may direct under O. 41, R. 25, Civil P. C., or otherwise. That the costs already incurred in respect of application No. 92 of 1934 and appeal No. 52 of 1923 be dealt with by the Chief Court at the conclusion of the proceedings under this remand. The respondent Satgur Prasad must pay the appellant's costs of this consolidated appeal.

K.S./R.K. *Case remanded.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondent —
Nehra & Co.

A. I. R. 1938 Privy Council 103

(*From Newfoundland*)

13th January 1938

LORDS ATKIN, THANKERTON, RUSSELL OF KILLOWEN, WRIGHT AND MAUGHAM.

Martin Cashin and others — Appellants.

v.

Peter J. Cashin—Respondent.

Privy Council Appeal No. 16 of 1937.

(a) Gift—Validity—Magnitude of bequests in subsequent will is practically no indication to negative previous gift.

The magnitude of the bequests in a person's will has always been regarded as of very slight importance as an indication to negative a previous gift or advancement : (*1833*) *2 Myl & K 262, Rel. on.* [P 105 C 2]

(b) Family arrangement — Agreement entered into fairly without concealment or imposition on either side — It cannot be disturbed, although parties may have greatly misunderstood their situation and mistaken their rights Family arrangement held could not be disturbed as it was fair and just.

Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties. [P 108 C 1]

A person transferred to his wife bonds as a gift. He died afterwards leaving a will, under which the widow and one of his sons were made executors. On valuation of the property after deducting the death-duty on the estate without including the bonds, the estate was found insufficient to pay the legacies. Each son of the deceased (of whom the respondent was one) received only half of the amount bequeathed. Soon afterwards a demand for additional death-duty was made on the footing that the bonds gifted to the widow formed part of the estate. Attempts to establish the gift and to resist the claim of the Government were made and the respondent was party to the same. Fully conscious that the claim could not be safely resisted, the additional death-duty was paid, though the letter accompanying the amount made it clear that the sons did not depart from the contention that the bonds were the property of the widow. Soon after a deed was executed by the widow and the sons including the respondent, who was not only of more than the age of discretion but a merchant of great knowledge, ability and experience, which stated in plain terms that the widow was to provide a sum sufficient to pay additional death duty and all pecuniary legacies in full, and on the other hand, the sons were to give up any claim against her in relation to the bond. After the deed the widow paid all the balance of the legacies. The respondent brought a suit to set aside the deed

on the ground that it constituted a release or gift of the bonds to a person in a fiduciary relationship, and in the alternative, if the deed intended to take effect as a family arrangement, it was an agreement *uberrimæ fidei* casting upon the executors a duty of full disclosure, which they failed to fulfil:

Held that the deed was framed and took effect as family arrangement. It did not in any sense purport to be a sale; it was a release by the sons of a doubtful claim against their mother. The mother was not a trustee at the date of the deed of the bonds for the beneficiaries and that was so even if *ex post facto* it were to be decided that the gift had not been completed. Further her position as executrix gave her no advantage in coming to an agreement with her sons. Nor did the deed involve a family agreement tainted even in fact remotely with undue influence. The deed was generous and just and could not be set aside: *(1859) 7 H L C 750 and (1816) 3 Swans 400, Rel. on.* [P 107 C 2; P 108 C 1]

(c) Deed Liability under — Person executing deed neither blind nor illiterate—Plea of non est factum not open Executor is bound by deed, even though he has not read it or understood it.

In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law, except in those special cases where there is an equitable ground for setting aside or rectifying the deed. [P 109 C 1]

(d) Family arrangement — Setting aside—Family arrangement cannot be set aside merely because it is unfair to one party.

Family re-settlements executed between father, tenant for life, and son, tenant in tail, the latter being advised by the same solicitor as the former, can be considered reasonable and supported by the Court even though, from a pecuniary point of view, the son's position is greatly prejudiced. A parent can be generous to a son, or legitimate children to an illegitimate one, or a son to a mother upon the occasion of a family arrangement without its being proper or possible in equity, merely on that ground, to suggest that the arrangement is an unfair one and ought to be set aside: *(1856) 5 H L C 627 and (1874) 20 Eq 698, Rel. on.* [P 109 C 1, 2]

(e) Gift — Imperfect gift followed by appointment of donee as executor entitles donee to property.

An imperfect gift followed by the appointment of the donee as executor, the intention to give continuing, entitles the donee to the property: *(1874) 18 Eq 315; (1908) 2 Ch 251 and (1912) 2 Ch 528, Rel. on.* [P 109 C 2]

Walter Monkton, H. A. Winter and B. J. Mackenna — *for Appellants.*

R. O. Wilberforce — *for Respondent.*

Lord Maugham.—This is an appeal from the judgment of the Supreme Court of Newfoundland (Sir William H. Horwood C. J. Kent J. and Higgins J.) given on 8th January 1937, dismissing by a majority (Kent J. dissenting) an appeal from the judgment of Sir William H. Horwood C. J. given on 21st July 1936. By the judgment it was ordered that an agreement under seal dated 8th September 1927, to which the appellants and the respondent were parties be set aside, and declared to be null and void. The agreement under seal dated 8th September 1927, (which will be referred to as "the deed") related to the estate of Sir Michael P. Cashin who died on 30th August 1926. He left surviving him his wife, the appellant Gertrude C. Cashin (Lady Cashin) and four adult children, the appellants Lawrence V. Cashin, and Martin Cashin, the respondent Peter J. Cashin, and a married daughter Mrs. Mary Fox. Sir Michael Cashin had made his last will on 15th November 1925. By it the appellants Lady Cashin and Lawrence Cashin were appointed to be the executors. He bequeathed to each of his sons $40,000, and after some small charitable and other legacies he bequeathed the residue of his estate to Lady Cashin for life and after her death to his three sons in equal shares. The two executors proved the will on 20th September 1926. According to the inventory and valuation of the property filed with the petition for letters of probate the total value of the estate was $99,496. The sum of $4702, being the duty payable on this amount under the (Newfoundland) Death Duties Act, 1914 to 1916, was promptly paid. On this footing the estate was insufficient to pay the legacies in full and in fact the three sons would have received roughly only $20,000 apiece, and there would have been no residue.

Sir Michael in the year 1924 had made or at least attempted to make some large gifts to Lady Cashin. In particular he had, in circumstances which were investigated at the trial, transferred to her $300,000 Dominion of Canada 5 per cent. 1943 Bearer Bonds. That transaction took place on 8th May 1924. He also on the same day had given to her $40,000 which had been standing to his account at the Montreal Trust Company, St. John's; and on 21st May 1924, he gave to her a further sum of $20,000 which had been standing to his account at the Bank of

Montreal, St. John's. No attempt has been made by any person to impeach either of these latter gifts; but the respondent alleged in the action that the gift of the bonds was imperfect and therefore void; and it is necessary to state certain undisputed facts as to this alleged gift. Sir Michael had purchased the bonds through agents in Canada in March 1924, and they were forwarded to him at the Bank of Montreal, St. John's. After the arrival of the bonds, Sir Michael with his son Mr. Lawrence Cashin, went to the Bank of Montreal, took possession of the bonds and placed them in a safety deposit box rented by him in the vaults of the Royal Bank of Canada, and in which he kept his personal papers and securities. Shortly afterwards, Sir Michael, wishing to present these bonds to his wife as a gift, consulted his son-in-law, Mr. Cyril J. Fox, K. C., a lawyer of experience practising in St. John's, as to how he could effect the gift.

The interview with Mr. Fox took place in Sir Michael's bedroom at his home in the presence of Lady Cashin and of his son Mr. Lawrence Cashin. Sir Michael told Mr. Fox of his intention to give the bonds to his wife and asked him what he should do to carry out his intention. Mr. Fox told him he might do so either by deed or by manual delivery of the bonds themselves to Lady Cashin. Accordingly on or about 8th May 1924, shortly after his conversation with Mr. Fox, Sir Michael, accompanied by his son Mr. Lawrence Cashin, went to the Royal Bank of Canada for the purpose of transferring the bonds to Lady Cashin. At the bank he was told by the officials that it was necessary for Lady Cashin to be present to effect the gift and sign the lease of the deposit box to be issued to her for the safe keeping of the bonds in place of that previously held by Sir Michael. Mr. L. V. Cashin then went home for Lady Cashin and brought her to the bank for this purpose. Sir Michael surrendered his lease of the deposit box to the bank and the bank issued a fresh lease of the deposit box to Lady Cashin. She then executed a printed form on the back of the lease the substance of which (the original has long since been destroyed) was in these terms:

> I hereby designate 'Sir Michael Cashin and Mr. Lawrence Cashin' as my deputies to have access to and control of the contents of Safe Deposit Box (giving the number) now rented by me in the vaults of the Royal Bank of Canada, etc., until this authority is revoked in writing to the Bank.

It should be added that at this date Mr. Lawrence Cashin was living at home with his father and mother. If the matter had rested upon these undisputed facts, it seems to their Lordships, that no question as to the validity of the gift of the bonds could have arisen; but Sir Michael, after his return to Newfoundland from a visit to England on account of his health, in the summer of 1924 and until his death some three years later, used his power under the proxy form above set out to collect and cash the coupons attached to the bonds. This circumstance in a case where—as here—husband and wife are living in amity together, is capable of an easy explanation, but it is to be observed that in this case no explanation of it was given at the trial. Two other facts may be mentioned as possibly having some bearing on the question of the completeness of the gift. Sir Michael continued to pay income-tax on the bonds. This would be natural enough if there were evidence that he was collecting the coupons with Lady Cashin's consent. The other circumstance is the magnitude of the bequests in his will. This has always been regarded as of very slight importance as an indication to negative a previous gift or advancement: (1833) 2 Myl & K 262[1] at p. 276. Moreover the will read as a whole contains some indication that he did not consider the bonds to be his. After his conversation with his son-in-law and the transaction at the Royal Bank of Canada on 8th May 1924, it does not seem an unlikely conjecture that, if he had desired the bonds which he had placed in the possession of his wife to pass under his will, he would have mentioned them in terms. A will speaks from the death of a testator. Sir Michael may have expected or at least hoped when he made his will to gain large sums of money before his death. In fact he gave up his position and his interest in the family business of Cashin and Company on 1st December 1925, and died suddenly some nine months later.

As has been stated, death duties on the estate had been paid on the footing that the bonds had been given to Lady Cashin over two years before the death, the period before death necessary to enable the exe-

1. Comp. Dummer v. Pitcher, (1833) 2 Myl & K 262=Coop. t. Brough 257=5 Sim 35=39 R R 203.

cutors to escape the payment of duties in respect of a gift under the law of Newfoundland. Some six months later, endeavours were made on behalf of the Minister of Finance to obtain payment of death duties on the bonds on the footing that they formed part of the estate, the contention being based on the fact that Sir Michael had collected and used the interest on the bonds during his lifetime. Affidavits by Mr. Lawrence Cashin and Lady Cashin to establish the gift did not succeed in getting the revenue authorities to abandon the claim. The respondent Mr. Peter Cashin was then made acquainted with the contention put forward by the Government, and he and Mr. Lawrence Cashin interviewed Sir John Crosbie, the Minister of Finance, who explained to them the Government's contention. They were unable to persuade him to abandon it. In August 1927, a formal claim was made for payment of death duties in respect of the bonds. When this claim was received, Mr. Lawrence Cashin again consulted with the respondent, who, it should be mentioned, was at this time his partner, as to the course that should be pursued. They went to see first Mr. Wood, K. C., and then another lawyer, Mr. Howley, as to whether or not the estate was liable. According to the respondent, the advice of these gentlemen was not encouraging; and ultimately in order to avoid publicity and the necessity of Lady Cashin appearing in Court it was decided that the payment should be made. On 24th August 1927, a cheque for 25,257 dollars 56 cents was forwarded to the Minister of Finance by the executors in settlement of the claim for additional death duties. The letter accompanying the cheque contained the following passage :

We beg to enclose certified cheque for $25,257.56 amount of said corrected assessment, but in doing so we desire it to be distinctly understood, that we do not depart from our contention that the Canadian Bonds were at the time of Sir Michael's death the property of Lady Cashin.

We are advised, however that principally owing to the fact, that the interest on these Bonds was placed to the credit of Sir Michael Cashin, that the Bonds although the property of Lady Cashin, are technically liable for the Death Duties.

We therefore make this payment without prejudice to the ownership of Lady Cashin.

A few days later, the deed which is the subject of the appeal and which had been discussed for some time previously was executed by the four persons concerned, namely Lady Cashin and her three sons. It undoubtedly binds the respondent unless it can be established that there is some sufficient ground in equity for setting it aside. There is no suggestion of fraudulent representation raised by the pleadings and no allegation which would support a plea of *non est factum*. The deed (omitting attestation and signatures) was in these terms :

This Indenture made the 8th day of September Anno Domini One thousand nine hundred and twenty-seven, between Gertrude C. Cashin of Saint John's in the Island of Newfoundland, Widow of the first part, Peter J. Cashin of the same place Merchant of the second part, Martin F. Cashin late of Montreal in the Dominion of Canada (but at present of Saint John's in the Island aforesaid) Doctor of Medicine of the third part, and Lawrence V. Cashin of the same place Merchant of the fourth part.

Whereas Michael P. Cashin of Saint John's, Merchant, died on or about the 30th day of August Anno Domini One thousand nine hundred and twenty-six having previously made and executed his last Will and testament in which he bequeathed certain pecuniary legacies to the party of the first part and other parties And Whereas probate to the Will of the said deceased was granted by the Supreme Court of Newfoundland to Gertrude C. Cashin and Lawrence V. Cashin the Executrix and Executor therein named And Whereas the Estate of the said Michael P. Cashin is insufficient to pay the legacies bequeathed by his said Will And Whereas prior to his death on or about the 8th day of May Anno Domini One thousand nine hundred and twenty-four the deceased transferred and made over to the said Gertrude C. Cashin certain Bonds of the Government of Canada to the par value of Three Hundred Thousand Dollars for her sole and absolute use and benefit And Whereas payment of Death Duties in respect of the said Bonds was claimed by the Government of Newfoundland and settlement in respect of the said claim was made And Whereas the parties hereto are desirous of carrying into effect the wishes of the said deceased as set forth in his said Will and by the said transfer of the Bonds to the said Gertrude C. Cashin, Now This Indenture Witnesseth in consideration of the premises and by way of family arrangement the parties hereto hereby agree as follows :

"1. The party of the first part agrees and undertakes to provide such a sum over and above the realised value of the Estate of the said deceased as will be sufficient to pay all the liabilities of the said deceased at the time of his death and all Death Duties paid or payable to the Government of Newfoundland in respect of his Estate and all the pecuniary legacies bequeathed by the said deceased by his said Will (including the legacies to the second, third and fourth parties) in full.

"2. The parties of the second, third and fourth parts hereby do and each of them doth recognise and admit the validity of the said transfer and making over to the said Gertrude C. Cashin of the said Bonds of the Government of Canada and hereby release the said Gertrude C. Cashin from any claim of them or either of them in respect thereof and in so far as they may or can have and do hereby confirm the said Bonds unto the said

Gertrude C. Cashin absolutely freed and discharged of any claim which they or either of them has or may or can have upon the said Bonds or any part thereof."

There is no difficulty in understanding this deed. It might have been better to recite that doubts had arisen as to whether the transfer to Lady Cashin had been so completed that notwithstanding the collection and retention of the coupons by Sir Michael the bonds became the property of Lady Cashin on 8th May 1924; but the respondent as well as his brothers was fully conscious that it was on this ground that the claim of the Government was made, and the respondent himself was well aware of the doubts which had existed since he had accompanied Mr. Lawrence Cashin on the visits both to Mr. Wood, K. C. and to Mr. Howley to obtain advice as to whether the claim of the Government could safely be resisted. In these circumstances the deed states in plain terms that Lady Cashin is to provide a sum sufficient to pay the additional estate duty and all the pecuniary legacies in full and on the other hand her three sons are to give up any claim against her in relation to the bonds. The deed does not purport to be nor is it in substance an agreement by the executors with the beneficiaries. Lady Cashin was in possession of the bonds and plainly thought and it may be added, had stated on oath, that she had a good title to them. Mr. Lawrence Cashin, the other executor, was of the same opinion and had pledged himself in that sense by an affidavit of 7th March 1927. The respondent if he had wished to contest the validity of the gift would have had to obtain the leave of the Court to use the name of Mr. Lawrence Cashin upon a proper indemnity to sue Lady Cashin. He might well hesitate a long while to take such a step; and there was a family reason against it, namely the fact that the daughter Mrs. Mary Fox had been left out of the will and that it was desirable to place Lady Cashin in a position to provide for her. After the deed was executed its provisions so far as Lady Cashin was concerned were at once carried out. On 9th September 1927 Mr. Martin Cashin received the sum of $20,000, the balance of his legacy of $40,000. The first $20,000 had been paid to him on account on 18th June 1927 to enable him to open an office in Montreal. The respondent and Mr. Lawrence Cashin each received his legacy of $40,000, or an equivalent in Canadian bonds either on 9th September 1927 or shortly afterwards. Their Lordships are well aware that the respondent stated that he had received his legacy in October or November 1926; but on careful consideration of the evidence they are satisfied that this is not correct. His recollection in some other respects was plainly shown to be unreliable, and Mr. Lawrence Cashin was quite certain that no such payment or handing over of bonds was made to him till after the deed which alone made such a payment or handing over a proper one.

So far as the evidence goes, peace reigned in the family till October 1930. At that time the respondent asked Mr. Lawrence Cashin to destroy the deed, a request which of course was not complied with. The action was commenced in the year 1936. The delay in commencing it is not explained. It is sought to set aside the deed mainly on the ground that it constituted a release or gift of the bonds to a person in a fiduciary position based upon statements therein which did not accord with the facts. In the alternative it is contended that the deed if intended to take effect as a family arrangement was an agreement *uberrimæ fidei* casting upon the executors of Sir Michael Cashin a duty of full disclosure which they failed to fulfil. The assumption on which both these contentions rest is that the bonds had not been the subject of a complete gift by Sir Michael to Lady Cashin and therefore at his death formed part of his estate. It seems to their Lordships that this is not the correct method of approach to the question whether the deed can now be set aside. The proper course is first to consider the true nature of the transaction embodied in the deed and secondly to ascertain what facts as to the alleged gift were then known to the parties including the executors and what representations if any were made to or what facts were withheld from the respondent. On the first point it seems clear to their Lordships that the deed is framed and takes effect as a family arrangement. It does not in any true sense purport to be a sale; it is a release by the three sons, of a doubtful claim, against their mother. It is an entire mistake on the admitted facts to treat Lady Cashin as if at the date of the deed she were a trustee of the bonds for the beneficiaries, and that is so even if *ex post facto* it were to be decided that the gift

had not been completed. Further it is clear that Lady Cashin's position as regards the deed was just the same as if she had not proved the will of Sir Michael. She had no information as an executrix as to the validity of the gift or the want of it which she did not possess before her husband's death, and her position as executrix gave her no advantage in coming to an agreement with her sons. Nor does the deed involve a family agreement tainted in fact even remotely with undue influence. There is here no suggestion, to use a celebrated phrase, of influence being acquired and abused, or of confidence being reposed and betrayed: (1859) 7 H L C 750[2] at p. 779. In this view of the transaction, it seems to their Lordships that the law as laid down by Lord Eldon L. C. as long ago as the year 1819 in the case in (1816) 3 Swans 400[3] at p. 463 is apposite :

> Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement ; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties.

It will be noted that there is no mention of a necessity for independent advice, and that the agreement may well stand though the parties have greatly misunderstood their situation. On the other hand, no doubt there are cases in which a young and inexperienced person, more particularly if he is contracting with persons with whom he is not, owing to their position or experience or for some other reason, on equal terms, ought as a matter of fairness to be separately advised. In the present case the respondent was not only of more than the age of discretion, but he was a merchant of such knowledge, experience and ability that he was appointed in the next year to be Minister of Finance. If there was any inequality in relation to capacity to contract as between him and his mother it was clearly not due to an insufficiency on the side of the former. Their Lordships have then to consider whether the transaction was founded upon falsehood or misrepresentation, including in that term a concealment of material facts, and whether it was unfair having regard to the circumstances as then known to the other parties to the deed. It has already been observed that no actual misrepresentation whatever is alleged in the statement of claim. A concealment of any material fact would no doubt be just as serious as a misrepresentation, see (1816) 3 Swans 400[3] at pp. 470, 473, 476, and a failure to make full and complete disclosure of the assets of the estate (apart from the bonds), was indeed alleged in the particulars ; but this allegation was disproved at the trial and is not now relied on. At the trial the respondent swore that the deed was brought to him at his office (meaning the partnership office) by his brother Lawrence, and that he had never seen it before. According to his account it already had on it the signature of his mother. Mr. Lawrence Cashin said to him

> " Mr. Wood (the family solicitor) has drafted this and mother feels that she should get back these death duties by us signing this and we feel this is a legal opportunity of getting back the death duties. "

The respondent alleges that he expressed an opinion that they would not get back the duties, and then signed the deed without reading it. The appellant Martin Cashin was also present and according to the respondent, he read it and signed, it and said he did not think it was worth the paper it was written on. If he said so, it could only be in regard to recovery of the duties that he made such a remark for anyone capable of transacting business must have seen that by it Lady Cashin was making herself liable to pay a large sum (more than $ 60,000) and was being released from any claim to the bonds. Mr. Lawrence Cashin's account of the matter was different in important respects. In particular he swore that the deed had been talked over repeatedly in the family and that the respondent was fully aware of its contents. Their Lordships must observe that on the respondent's own showing the deed, being executed with a hope of getting a return of the duty on the bonds, must obviously have contained in some form or other a formal and final assertion, admission or acknowledgment of the validity of the gift of the bonds, since that was the only point in dispute with the Government. Nor can it be forgotten that the respondent had been a party to at least three discussions on the matter,

2. Smith v. Kay, (1859) 7 H L C 750.
3. Gordon v. Gordon, (1816) 3 Swans 400 = 36 R R 910.

the first with the Minister of Finance, a second with Mr. Wood and a third with Mr. Howley, that he was a partner with Mr. Lawrence Cashin and was constantly seeing him, that there was nothing whatever to prevent him reading the deed as his brother Martin in fact did, and that it is impossible to believe that his brother and partner, Mr. Lawrence Cashin, who had in fact four copies of the deed in his hand, could have expected that the respondent would not read it. There is no suggestion of surprise or hurry on the occasion when the deed was executed. A statement in the witness-box by the respondent that, it looked as though, Lady Cashin and his two brothers, to say nothing of the family lawyer, Mr. Wood, had submitted the deed to him for his signature on the chance that he would not read it, which involves an imputation of a gross and disgraceful and a most foolish fraud, is one which is plainly without foundation.

Their Lordships wish to add that in a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him—not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed. There remains for consideration as a factor in the case the matter of the fairness of the transaction embodied in the deed. In view of the facts as known to Lady Cashin and Mr. Lawrence Cashin and to Mr. Martin Cashin, was the transaction one which was unfair to the respondent ? This is not a matter of balancing values which can be actuarially ascertained. An arrangement of the kind under consideration would not be unfair merely because it was generous on the one side or the other. For example, family re-settlements executed between father, tenant for life, and son, tenant-in-tail, the latter being advised by the same solicitor as the former, have been considered reasonable and supported by the Court even though from a pecuniary point of view, the son's position is greatly prejudiced. *See* (1856), 5 H L C 627[4] at p. 657; (1875) 20 Eq 698[5] and cases there cited. A parent can be generous to a son, or legitimate children to an illegitimate one, or a son to a mother upon the occasion of a family arrangement without its being proper or possible in equity merely on that ground to suggest that the arrangement is an unfair one and ought to be set aside. It would indeed be strange if an agreement entered into by parties of full contracting capacity could be set aside in equity because, regarded from the standpoint of the family, it was generous as well as just.

It should be stated that there was another and a serious difficulty in the path of the respondent which their Lordships think it right to mention lest it should be thought that it has escaped notice. There are several authorities which establish the proposition that an imperfect gift followed by the appointment of the donee as executor, the intention to give continuing entitles the donee to the property : (1874) 18 Eq 315,[6] (1908) 2 Ch 251,[7] (1912) 2 Ch 528[8] and *see* as to the meaning of the words "a continuing intention" the remarks of Kennedy L. J. at pp. 538, 539. The point was not considered in the Courts of Newfoundland, and their Lordships think it better to express no opinion as to it. In relation to the execution of the deed in this case, their Lordships have been unable to come to the conclusion that there was any material fact which was not known to the respondent bearing upon the question of the prospects of the proceedings against Lady Cashin to recover the bonds. The respondent as appears from his own evidence had all along known that Sir Michael after May 1924 had collected the interest on the bonds and he also knew of the contents of the will and of the claim by the Government. For the reasons already given, the respondent could not in the circumstances have the deed set aside because it was a record of an unsatisfactory bargain on his part ; but it may be well to add that in the opinion of their Lordships even that is not made out.

4. Savery v. King, (1856) 5 H L C 627 = 25 L J Ch 482=2 Jur (N S) 503=4 W R 471.
5. Fane v. Fane, (1875) 20 Eq 698.
6. Strong v. Bird, (1874) 18 Eq 315=43 L J Ch 814=30 L T 745=22 W R 788.
7. Stewart, In re; Stewart v. McLaughlin, (1908) 2 Ch 251=77 L J Ch 525=99 L T 106 = 24 T L R 679.
8. In re Pink, (1912) 2 Ch 528=81 L J Ch 753= 107 L T 241=56 S J 668=28 T L R 528.

True it is that two learned Judges including the Chief Justice, have come to the conclusion, 12 years after the event, that the completeness of the gift of the bonds was not established. Kent J. came to an opposite conclusion. The recollection of the persons concerned so long after the transaction in May 1924, was plainly a good deal impaired, and it was probably for that reason that Lady Cashin's evidence left several matters untouched and unexplained. Their Lordships do not think it necessary to express an opinion as to whether the bonds were effectively given to Lady Cashin or not ; they are satisfied that proceedings against her in 1927 would have had very doubtful prospects of success and on this view the deed was in no sense unfair to the respondent.

To summarize, their Lordships have come to the conclusion that there was neither concealment of material facts nor any want of fairness in the transaction embodied in the deed. Their Lordships are accordingly of the opinion that the appeal must be allowed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

V.B.B./R K. *Appeal allowed.*

Solicitors for Appellants—*Allen & Overy.*
Solicitors for Respondent —
Lawrence Jones & Co.

*** A. I. R. 1938 Privy Council 110**

(*From Allahabad*)

21st January 1938

LORD MACMILLAN, LORD ROCHE AND SIR GEORGE RANKIN.

Mohammad Habibul Haq and others — *Plaintiffs* — Appellants.

v.

Seth Tikam Chand — *Defendant* — Respondent.

Privy Council Appeal No. 27 of 1934, Allahabad Appeal No. 43 of 1932.

*** Limitation Act (1908), Arts. 145, 49— Government promissory notes left by debtor with creditor as security for amount borrowed or for safe custody— Suit for recovery of promissory notes or for credit of amount realized by sale of notes is governed by Art. 145 and not by Art. 49.**

Where Government promissory notes are left by a debtor with his creditor as a security for a sum borrowed by him or for safe custody, a suit for recovery of the notes or for credit in the account between the parties for the sum realized by the sale of the notes and interest, is, in either case, governed by Art. 145 and not by Art. 49.

[P 112 C 2]

J. M. Parikh — *for Appellants.*

L. P. E. Pugh and W. Wallach — *for Respondent.*

Lord Roche. — This is an appeal from a decree, dated 6th July 1932, of the High Court of Judicature at Allahabad setting aside the decree, dated 29th May 1928, of the Subordinate Judge of Agra. The dealings between the original parties to the suit or their predecessors in business extended over very many years and litigation or disputes culminating in litigation have been in progress for nearly 20 years. Of the matters litigated between the parties only two points remained for decision upon the hearing of this appeal. Those points are :

First : Whether a deed bearing date 25th January 1918, executed by the original plaintiff in favour of the original defendant remained effective notwithstanding a compromise between the parties made in 1921 or was cancelled by such compromise.

Second : Whether the original plaintiff was or was not entitled to the benefit of certain Government promissory notes of the face value of Rs. 13,000 which had been deposited by him with the said defendant as security and was or was not entitled to recover the said promissory notes or the amount realized by their sale.

The Subordinate Judge found on both these points in favour of the plaintiff. The High Court reversed his decision on both points. Hence this appeal. The facts relevant to the understanding of the two points in issue are as follows : The original plaintiff (hereinafter for convenience referred to as the Sheikh) was a contractor and for the purposes of his business he had been for many years financed by the original defendant (hereinafter for convenience referred to as Tikam Chand) and by the father and grandfather of Tikam Chand. On 31st December 1917 an agreement was drawn up between the Sheikh and Tikam Chand the effect of which was that the sum stated to be due from the Sheikh was Rs. 5,05,186 and that this debt was to be satisfied partly by a sale deed in favour of Tikam Chand of certain properties of the Sheikh and partly by a bond for

the residue of the indebtedness. A sale deed bearing date 25th January 1918 was in fact executed in respect of properties valued at Rs. 1,65,000 and by the same deed a mortgage was created on other property valued at Rs. 25,000. On 26th January 1918, the Sheikh executed a bond in respect of the residue of the debt. The amount of the bond was over three lacs of rupees. There was a dispute in this suit as to whether the total indebtedness was really five lacs or thereabouts or whether that sum was merely provisional and subject to modification by taking of an account. The Subordinate Judge has accepted the view in favour of the Sheikh that the amount was merely provisional, while the High Court has taken the opposite view. Their Lordships regard this matter as of little if any importance. It is at all events clear that as regards the bond the position was entirely altered by an agreement in writing between the parties dated 8th December 1919, by which it was agreed that the sum due under the bond dated 26th January 1918, was Rs. 1,39,000 and provision was made for satisfying and securing this amount. The sale agreement dated 25th January 1918 was not referred to in the agreement of 8th December 1919.

Tikam Chand was not long satisfied with this substituted agreement of 8th December 1919, and disputed its validity. On 30th June 1920, he filed a suit (No. 219) against the Sheikh and certain persons employed by or related to himself claiming that the agreement of 8th December 1919 was obtained from him by the fraud of the defendants to the suit and was null and void and that the amount due to him was not the lesser sum of Rs. 1,39,000 but the bond amount of over three lacs of rupees. In other words he sought to restore the position under the bond. Again no mention was made of the sale deed. That deed had become operative as from its date and the properties which it purported to convey to Tikam Chand were in fact transferred to him. The suit No. 219 of 30th June 1920, did not proceed to trial but was compromised between the parties. A petition of compromise dated 25th October 1921 was presented to the Court and on 7th November 1921 a decree was passed on that petition. The decree set out the terms of compromise of which the material terms are as follows :

1. The documents, dated 26th January 1918 and 8th December 1919, the possessory mortgage-deed, dated 6th January 1920, and the rent agreement, dated 6th January 1920, executed by defendant 1 in favour of the plaintiff shall be declared to be null and void. No party shall, in future, be competent to seek any remedy of any kind against the other party under those documents.

2. In lieu of the amount of claim and costs and interest, etc., to this date defendant 1, viz. Sheikh Mohammad Habib Ullah, shall pay to the plaintiff a sum of Rs. 1,65,000 in cash of the current coin, half of which is Rs. 82,500, in three years and six months time as per details given below.

Then followed details of instalments to be paid and provisions as to interest and as to the pledge and hypothecation of certain specified properties of the Sheikh as security for payment. Execution proceedings were taken by Tikam Chand to enforce this decree but before full satisfaction was obtained, this suit was brought by the Sheikh on 13th April 1926. He in his turn alleged fraud and attacked the compromise of 1921 and sought to set it aside as obtained by fraud. He alleged that the compromise was based upon a new promise by Tikam Chand to finance his business with fresh loans of large amount and in other directions to support his business. This part of the claim failed before the Subordinate Judge and there was no appeal from his decision. But there was also a claim based on the contention that under or notwithstanding the compromise the Sheikh was entitled to succeed in respect of points 1 and 2 referred to at the beginning of this judgment. It is on these points that the Courts below have differed and they now remain for decision.

As to point 1 their Lordships have no doubt that the High Court was right in deciding against the Sheikh and that the Subordinate Judge was in error in deciding in his favour. As a mere matter of construction, their Lordships are of opinion that the sale deed was not referred to or superseded or cancelled by the compromise. There is no reference in the compromised decree to a document which though it may have been executed on 26th January 1918, clearly bore date of 25th January 1918. The language and punctuation of clause 1 of the decree of 7th November 1921 indicate that only one document of 26th January 1918, is referred to and where two documents of one date are in question, as in the case of documents dated 6th January 1920, both are expressly mentioned. Again the decree is

specific and detailed as to the working out of its provisions and it is quite inconceivable if a sale deed already carried into effect at the date of the compromise were intended to be set aside by the compromise that consequential provisions should not be found there as to re-transfer of the properties in question and as to what was to happen as to mesne profits and other similar matters. If evidence as to surrounding circumstances and as to the identity of the deeds in question was admissible, a matter their Lordships think it unnecessary to determine in view of their decision as to the true construction of the document, then the effect of the evidence given is certainly against the appellants. So far as can be traced, no reference to the sale deed occurred in the contentions of the parties down to the time of the compromise decree. The provisions of that deed had been carried out and done with. What was in dispute was the residue of the debt, its amount and the method of its satisfaction: in other words the money bond and the arrangements which were substituted for such bond. On the evidence of the responsible lawyer who drew up the compromise it is difficult and indeed impossible to imagine that he included under the name of a document of 26th January a document which was dated 25th January and which had never been mentioned to him in connexion with the compromise he was dealing with and putting into legal form. On this point therefore the appeal fails.

The second point seems no more difficult of solution; but here their Lordships are clearly of opinion that the Subordinate Judge was right and that the High Court was in error. The notes were originally deposited by the Sheikh as security for his borrowings. The bond of 26th January 1918, provides for their realization as part satisfaction of the bonded debt. The substituted agreement of 8th December 1919 treats them as still held by Tikam Chand as security and as the property of the Sheikh for which he was to have credit in part satisfaction of the reduced amount of indebtedness. So they remained to the end unless a story set up by Tikam Chand were established—a matter as to which the onus rests entirely on his side. That story is as follows : The sale agreement provided that one of the properties sold which was an uncompleted bungalow should be completed by the Sheikh; and if it were not so completed by him power was given to Tikam Chand to complete it at the expense of the Sheikh. The story is that Tikam Chand did so complete it and his right to payment was satisfied by the realization with the consent of the Sheikh of the promissory notes and by the application of the proceeds to this specific debt of the Sheikh. This story was supported by hearsay evidence only, which, apart from its inadmissibility, was of no weight or value. The Subordinate Judge was in their Lordships' opinion correct in dismissing the story as unproved and the Judges in the High Court seem to have put the onus on thewrong party and to have decided that they were not satisfied that the Sheikh had disproved the truth of the story. They also appear to have regarded the story as probable. Their Lordships take an entirely different view. They have already pointed out that the sale agreement, which was the document containing the provisions as to this bungalow, was over and done with at a time when the bond was varied by the agreement of 8th December 1919. The promissory notes were then treated as still the property of the Sheikh and as proper to be dealt with in connexion with the general and residual indebtedness of the Sheikh and not in connexion with the bungalow or any matter of the sort. The High Court also considered that if the notes were left with the defendant without any particular contract Art. 49, Lim. Act, applied to bar the Sheikh's claim inasmuch as it was not made within three years. Their Lordships agree with the Subordinate Judge that this Article had no application. The notes remained with Tikam Chand as security or at any rate for safe custody and on either view not Art. 49 but Art. 145 is the relevant Article and the suit was well within time. The appeal must therefore succeed on this point. The notes have been sold under circumstances not satisfactorily explained, but the appellants, though they cannot recover the notes, are entitled to credit in the account between the parties for the sum realized by the sale of the notes with interest. If they have fully satisfied their indebtedness under the compromise decree out of other moneys they are entitled now to payment of Rs. 15,000 the proceeds of the notes and interest thereon as decreed by the Subordinate Judge. Their Lordships will humbly advise His Majesty

accordingly. There remains the question of costs. The success which the appellants have in the end secured is small in comparison with the extent of the original claim and even in comparison with the claim with regard to the sale deed which was in controversy before the High Court and before this Board. Their Lordships therefore think that the proper order would be that each party should bear its own costs in the two Courts below and upon this appeal.

R.M./R.K. *Appeal succeeds.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
Douglas Grant & Dold.

A. I. R. 1938 Privy Council 113

(*From Oudh : A I R 1934 Oudh 190*)

24th January 1938

LORD MACMILLAN, LORD ROCHE AND SIR GEORGE RANKIN.

Thakur Gaya Bakhsh Singh since deceased (now represented by Rani Suraj Kunwar and another) and another — Appellants.

v.

Deo Singh and others — Respondents.

Privy Council Appeal No. 44 of 1935, Oudh Appeal No. 4 of 1934.

(a) Oudh Estates Act (1 of 1869), S. 22—Heir—'Heir' does not necessarily mean immediate heir—It includes heir of heir provided he inherits under special provisions of the Act.

The word 'heir' does not necessarily mean immediate heir. It includes heir of heir provided he inherits under the special provisions of the Oudh Estates Act. Apart from this general consideration, it is prima facie unreasonable that in a case in which the name of a deceased owner was entered in the lists under S. 8, the first successor after the passing of the Act should not be regarded as his heir in spite of the fact that he took by inheritance and not by transfer or bequest.

[P 116 C 2]

(b) Oudh Estates Act (1 of 1869), S. 22—Word 'heir' cannot be restricted to those who inherit under S. 22.

The word "heir" cannot be restricted to those who inherit under S. 22: it is used in S. 23 and applies to every estate whose owner was entered in list 1 whatever the rule of succession. The limitations prescribed by the lists are as much rules of succession so far as they go as the provisions of Ss. 22 and 23 of the Act : *A I R 1926 Oudh 594, Approved.* [P 117 C 1]

(c) Oudh Estates Act (1 of 1869), S. 22—Provisions as to succession of sanad granted before passing of the Act re-affirmed by Ss. 3 and 10—Person succeeding after passing of Act succeeds by virtue of Act.

Where the provisions as to succession in a sanad granted before the passing of the Oudh Estates Act are re-affirmed by S. 3 of the Act and reinforced by S. 10, as regards succession after 1869, to oppose the sanad to the Act may be a false antithesis. The person succeeding after the Act succeeds not by virtue of the sanad but by virtue of the provisions of the Act and is an heir of a taluqdar within the meaning of the Act.

[P 117 C 1, 2]

(d) Oudh Estates Act (1 of 1869), S. 22—Taluq entered in list under S. 8 in year 1869 in name of person dying before passing of Act — Succession to taluq is governed by S. 22.

Where a taluq is entered in the year 1869 in the list under S. 8 in the name of a person who was dead before passing of the Act, it cannot be said that the Act does not apply to the taluq. Such entries are not unknown and the succession to the taluq would be governed by S. 22. [P 117 C 2]

(e) Oudh Estates Act (1 of 1869), Ss. 14 and 22 — Bequest by taluqdar before passing of the Act — System of succession to estate is that prescribed by Act—S. 22 applies to the case by force of S. 14.

In the case of a bequest which is within the retrospective words with which S. 14 opens, and which was made by a taluqdar to a person who would have succeeded according to the provisions of the Act (had they been in force at the time when the succession opened) the consequence attached by S. 14 is that such person shall have the same rights and powers in regard to the property and shall hold the same subject to the same conditions and to the same rules of succession as the testator. The effect of this section is that the system of succession to the estate is that prescribed by the Act and not to perpetuate a system of succession under the bare terms of the original sanad and outside the main provisions of the Act. No doubt some saving of vested rights may be implied in retrospective legislation, but subject to that, the section operates retrospectively as well as prospectively in order to achieve the same result for all estates of the same class. The inclusion within the section of persons who would have succeeded under the Act, is intended to preserve in such cases the same character to the estate as it would have continued to bear if the succession had been *ab intestato*. The effect of S. 14 is to put such legatee as the holder of an estate within lists of S. 8 and hence whether or not S. 22 applies to his case of its own force, it is applied by force of S. 14. [P 117 C 2 ; P 118 C 1, 2]

J. P. Eddy and T. B. W. Ramsay — *for Appellants.*

A. M. Dunne, W. Wallach and M. H. Kidwai — *for Respondents.*

Sir George Rankin.—This appeal was brought by Thakur Gaya Bakhsh Singh, who will be referred to herein as "the appellant," though he assigned part of his interest to appellant 2 and has died since the appeal was brought. He was defendant 1 to a suit filed on 16th February

1931, in the Chief Court of Oudh in its original jurisdiction by respondent 1, Deo Singh, a minor (herein called "the respondent"). The plaint claimed a number of properties and impleaded four defendants, but this appeal relates only to three estates and defendant 1 is the only party disputing this claim before the Board. These estates are taluqdari estates in Oudh, and may be considered as one taluqa : the main estate goes by the name of Bharawan and is situated in the District of Hardoi : included in it are two smaller estates called Basantpur and Marhapur in the Districts of Lucknow and Unao. The respondent's claim was that he had become entitled to these estates upon the death on 12th December 1930 of a lady called Rani Deo Kuar. The facts out of which his claim arises are not in dispute. In 1859 at the Second Summary Settlement, the estates in question were settled with Raja Mardan Singh. In accordance with requests made to taluqdars by Government that they should make wills specifying the names of their heirs in cases where there was no practice of gaddinashini by custom or sanad, Raja Mardan on 5th March, 1860, executed a document called an ikrarnama, stating :

I therefore desire and apply that after my death my estate should remain intact and impartible in my family in the name of my eldest son Raja Randhir Singh according to the custom of Raj gaddi and the younger brothers shall be entitled to receive maintenance from the holder of the gaddi.

In compliance with these wishes, the sanad granted to him in a common form (cf. Sykes Compendium, p. 386) on 24th November 1862, conferred "the full proprietary right, title and possession" on him and his heirs for ever subject to conditions as to payment of revenue and the observance of certain rules of good behaviour towards Government. It provided also:

It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please.

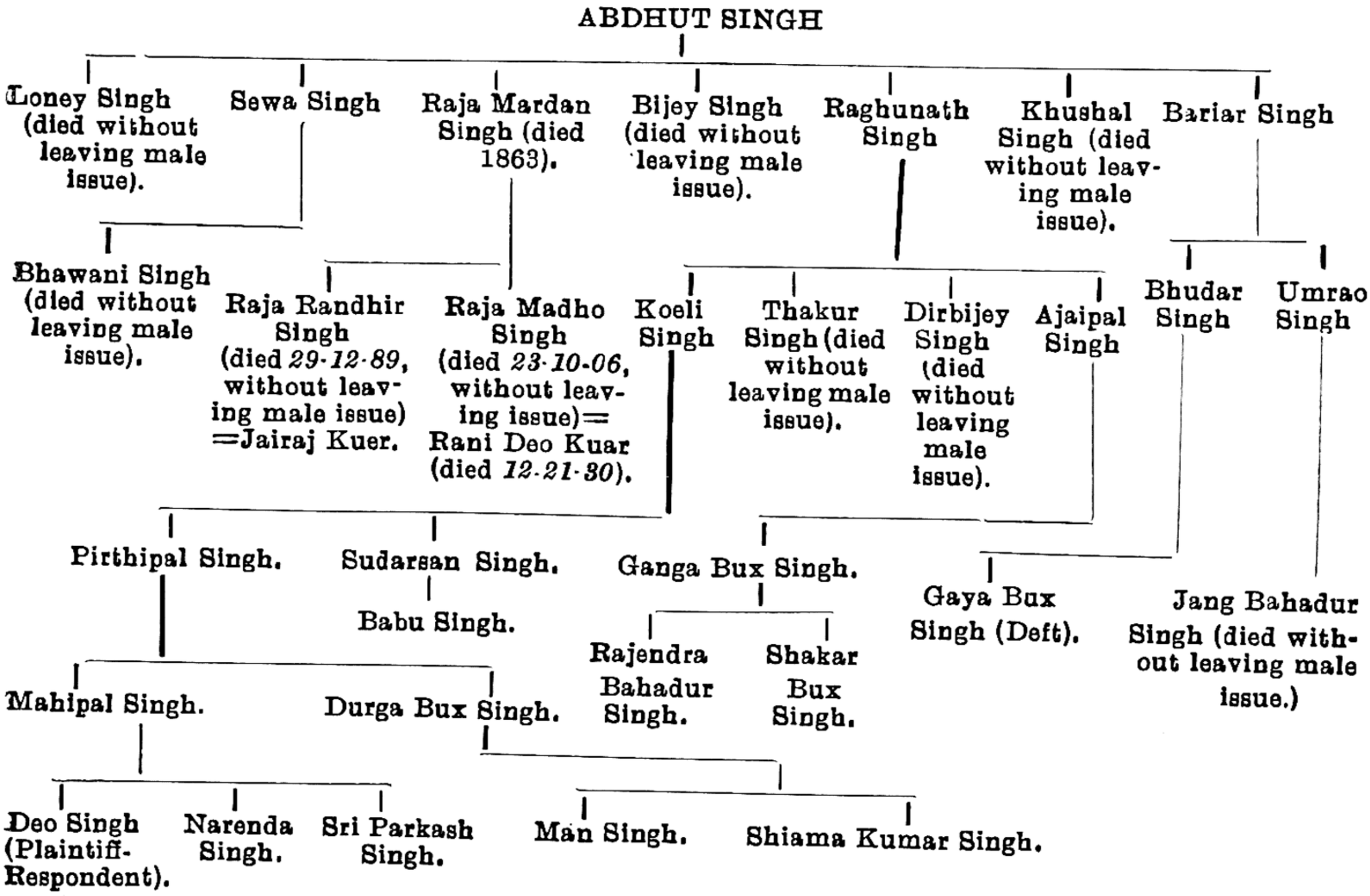
Raja Mardan Singh died in 1863 and was succeeded by his eldest son Raja Randhir Singh. The terms of the sanad were sufficient of themselves to vest the estate in Randhir on the death of his father, but the law applicable at that time to Hindus in Oudh imposed no formal requirements as to wills and it is the case both of appellant and respondent that Randhir could also claim to have succeeded under the ikrarnama as a will. In 1869 when Act I (the Oudh Estates Act) was passed in the lists prepared under S. 8 thereof the three estates now in question were entered in list I and the name of Raja Mardan Singh (though dead) was entered in lists 1, 2 and 5. In 1889 Randhir died without male issue and was succeeded by his brother Raja Madho Singh. On the death of Madho without issue on 23rd October 1906, he was succeeded by his widow Rani Deo Kuar. It is upon her death in 1930 that the respondent claims to have become entitled to the estate. In 1906 the respondent's father Mahipal Singh was alive, but he predeceased Rani Deo Kuar. The pedigree incorporated herewith shows the respondent's descent from Ragunath Singh, brother of Raja Mardan Singh, and that he is in the senior male line is not now contested.

(*for pedigree see next page*)

The objection taken by the appellant to the respondent's right to inherit the taluqa is that in 1906, on the death of Madho, the person entitled to succeed him was the respondent's father Mahipal Singh and not Madho's widow, Deo Kuar. If this be so, the appellant contends that whatever Article of the Limitation Act (be it Art. 140, 142, 144 or 120) applied to the case the respondent is out of time and his title has come to an end under S. 28 of the Act. This inference has not been accepted by the Chief Court either at first instance or on appeal. Upon the merits of the inference, something may depend on whether Rani Deo Kuar is regarded as having asserted and been permitted to enjoy a Hindu woman's estate or an estate "for her lifetime only" within the meaning of S. 22, Cl. 7 of Act 1 of 1869. In any view it raises difficult and important questions of law which have not been argued before the Board. Their Lordships do not find it necessary to pronounce upon them and without intending to suggest that the views taken in the Chief Court were wrong they refrain from discussing the matter. The right of Madho's widow to succeed him in 1906 depends upon the proposition that on his death S. 22 of Act 1 of 1869 as it then stood applied to the case.

The relevant parts of the Section are as follows :

22 If any Taluqdar or Grantee whose name shall be inserted in the second, third, or fifth of



the lists mentioned in section eight, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz. :—

(1) To the eldest son of such Taluqdar or Grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased :

(2) Or if such eldest son of such Taluqdar or Grantee, heir or legatee, shall have died in his lifetime, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid ;

(7) Or in default of any such brother, then to the widow of the deceased Taluqdar or Grantee, heir or legatee ; or, if there be more widows than one, to the widow first married to such Taluqdar or Grantee, heir or legatee, for her lifetime only.

For the appellant it is contended that succession to the estate at that time was governed by the sanad of 1862 but not by the Section. This argument proceeds upon the fact that the "taluqdar" or person whose name was entered in list 1 under S. 8 was Mardan Singh, though he had died in 1863, and upon the view that Randhir, who then succeeded, did not inherit the estate "under the special provisions of this Act" of 1869 so as to satisfy the definition of "heir" given as follows in S. 2 thereof :

Section 2.—In this Act unless there be something repugnant in the subject or context—

'Heir' means a person who inherits property otherwise than as a widow under the special provisions of this Act ; and 'legatee' means a person to whom property is bequeathed under the same provisions.

Randhir not being an "heir" it is said for the appellant that the Act, or at least S. 22 thereof never applied to regulate the succession to this estate ; that the death of Randhir was not the death of an "heir"; that Madho did not succeed under S. 22 but under the sanad, that he too was not an "heir" and that on his death Cl. 7 of the Section was not available to his widow. The respondent disputes this reasoning and further contends that Randhir may be regarded as having succeeded under his father's will, and that this attracted the operation of S. 14 of the Act. In 1906 S. 14 stood as follows :

If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate to another taluqdar or grantee, or to such a younger son as is referred to in S. 13, Cl.(2), or to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same riguts and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same sub-

ject to the same conditions and to the same rules of succession as the transferor or testator.

On the respondent's view this Section puts Randhir in the same position as his father would have held had he lived to hold under the Act. The appellant maintains that the utmost effect of the Section in this case is to put Randhir in the position of holding on the same terms as those upon which his father in fact held, viz. upon the terms of the sanad. The trial Judge was of opinion that S. 22 did not govern the succession to Madho. The Appellate Bench of the Chief Court held that it did. They proceeded upon two grounds, first, that Madho was an "heir" of Mardan within the meaning of S. 22; secondly, that S. 22 was applied to the case by S. 14. Their Lordships will examine both of these grounds. If Randhir be regarded as having succeeded his father in 1863 by inheritance in accordance with the terms of the sanad he cannot be said to have inherited under the special provisions of the Act of 1869. It is only the date, however, which excludes him : after the Act the sanads operated under S. 3 as the creatures of the Act and the Act itself conferred the title: 3 I A 259[1] at pp. 270-1. The Appellate Bench were of opinion that the same difficulty did not apply to Madho, and that as "heir" did not necessarily mean the immediate heir, Madho's death was the death of an "heir of a taluqdar" within the language of S. 22. The question would still remain : did Madho inherit under the special provisions of the Act? It was a noticeable and intentional feature of the Act that it did not apply the word "taluqdar" to anyone save the individual mentioned in list 1 (cf. Ss. 2 and 10). The result is that any subsequent holder is referred to in the Act as an "heir or legatee." If Ss. 7, 11, 13-16, 18-20, 30 and 31, be considered, in hardly any case is it reasonable to think that the powers therein specified were intended to apply only to an immediate taker from the taluqdar and to no other successor. Apart from this consideration the phrase in S. 7 "any heir or legatee of a taluqdar"; in S. 11 "every heir or legatee of a taluqdar"; in S. 13 "no heir or legatee of a taluqdar"; in S. 14 "the transferee or legatee and his heirs and legatees"—these can only with some difficulty be confined to immediate takers from the person mentioned in list 1. The general language of certain sections "subject to the same conditions and to the same rules of succession" (S. 14) or "subject to the same conditions and in the same manner as the estate was held by the deceased" (S. 22) might in some cases reapply other sections on the footing that the latter of their own force applied only to immediate takers. But it is doubtful whether formalities required by the Act for transfer or bequest are included by the word "conditions" which may more safely be interpreted with reference to the stipulations of the sanad. In any view their Lordships are satisfied that the draftsman did not rely upon the word "conditions" in Ss. 14 and 22 for the purpose of applying the other sections above mentioned to the successors of immediate takers from the taluqdar. They agree with the Chief Court that an examination of the Act before its amendment by United Provinces Act 3 of 1910 shows that the following Explanation—added by the amending Act—serves only to make plain what is implicit in the true construction of the Act as it originally stood :

> *Explanation.*—The words 'heir' and 'legatee' used with reference to a taluqdar or grantee . . . are not restricted to the immediate heirs and legatee of such taluqdar, grantees or person.

This Explanation is very simply expressed and almost disguises the fact that "heir and legatee" is a phrase used very loosely if it be intended to cover not only the heir of an heir but the heir of a legatee, the legatee of an heir and the legatee of a legatee. But there is no great difficulty as to the word "heir" taken by itself. "Heir" is defined in Wharton's Law Lexicon as "a person who succeeds by descent to an estate of inheritance. It is *nomen collectivum* and extends to all heirs; and under heirs, the heirs of heirs are comprehended *in infinitum*." Their Lordships are so far in agreement with the Appellate Bench of the Chief Court as to consider that Madho should be regarded as an "heir" provided that he inherited under the special provisions of the Act. Independently of the general considerations already mentioned it is prima facie unreasonable that in a case in which the name of a deceased owner was entered in the lists the first successor after the passing of the Act should not be regarded as his heir in spite of the fact that he took by inheritance and not by transfer or bequest. The opposite view would do unnecessary violence to the Act.

1. Hurpurshad v. Sheo Dyal, (1875) 3 I A 259 = 26 W R 55=3 Suther 304=3 Sar 611 (P C).

in the interest of a literal construction. But it is necessary to see whether Madho inherited under the special provisions of the Act. If Randhir was not an "heir" then it may be said with force or at least with logic that on his death the succession was not within S. 22. This objection the Chief Court do not seem to have anticipated, but their Lordships will assume—without so deciding—that Madho did not inherit under the Section. Still, the question is not whether he succeeded under that Section but whether he "inherited property .... under the special provisions of this Act." The word "heir" cannot be restricted to those who inherit under S. 22: it is used in S. 23, and applies to every estate whose owner was entered in list I whatever the rule of succession. Their Lordships think there is great force in the observation made in the Chief Court in 1 Luck 529[2] that

> the limitations prescribed by the lists .... are as much rules of succession so far as they go as the provisions of Ss. 22 and 23 of the Act of 1869.

The Act by S. 3 conferred an independent title to these estates—permanent, heritable, and transferable. By the entry in lists 1, 2 and 5 the estates were made taluqdari estates; it was definitely declared that succession to them should thereafter be regulated by primogeniture and that the custom of the family before the Act had been that they devolved upon a single heir. They had come under the protection of the restrictions imposed as to transfer by Ss. 13, 16, 17, 18 and 20.

On the appellant's view that S. 22 did not apply at all, the provisions of the sanad as to succession were re-affirmed by S. 3 of the Act and reinforced by S. 10. Had Madho's title been challenged by someone claiming to share with him under their personal law, the Act would have stood before the sanad in Madho's lines of defence. As regards successions after 1869 to oppose the sanad to the Act may be a false antithesis. Madho succeeded by virtue of provisions of the Act which prescribed a course of succession unknown to the general Hindu law and was an heir of a taluqdar within the meaning of the Act. Their Lordships for these reasons do not feel constrained to hold that the estates in the present case could never come under Section 22 of the Act. That Randhir succeeded before 1869 is only another way of saying that the name entered in list I was the name of a dead man. "It is a matter of familiar knowledge that such entries of dead men's names were not uncommon" [*Per* Sir Arthur Wilson in 32 I A 203[3] at p. 209]. In that case it was held that to the Mahewa estate the Act never applied : before 1869 there had been two devolutions and a change of sanad since the time of the taluqdar. The appellant's argument, however, would frustrate the main intention of the Act in every case in which list I contained a dead man's name. This conclusion has never been accepted by the Board. In 43 I A 269[4] at p. 280, the Court of first instance had held that Jamshed Ali's name was wrongly entered in the lists and that in consequence the statute did not apply to the taluqa. This view was firmly negatived by the Board and Mr. Ameer Ali observed that "his death before the Act was passed into law makes no difference in his status or in his rights." Lord Lindley in 31 I A 30[5] at p. 37 put the matter with clearness and accuracy as follows :

> Entries of the names of deceased persons in the lists mentioned in S. 8, do not appear to have been contemplated by the Act but such entries have no doubt been made and they are practically harmless if the names were already in former lists made under the Order in Council, or if the entries do not alter the previously acquired rights of anyone.

It is not however right that the decision in the present case should be rested solely upon the foregoing considerations. If Randhir succeeded under his father's will it is more correct to regard him as a legatee than to found upon the right which he had to succeed in the absence of a testamentary disposition. If he be treated as legatee then S. 14 of the Act governs his position. Their Lordships are in full agreement with the reasoning and the conclusion of the Appellate Bench upon the effect of S. 14. In the case of a bequest which is within the retrospective words with which S. 14 opens, and which was made by a taluqdar to a person who would have succeeded according to the

2. Achche Mirza v. Ahmad Shah, (1926) 13 A I R Oudh 594=97 I C 922=1 Luck 529=3 O W N 693.

3. Sheo Singh v. Raghubans Kunwar, (1905) 27 All 634=32 I A 203=8 O C 317 (P C).

4. Murtaza Husain Khan v. Mahomed Yasin Ali Khan, (1916) 3 A I R P C 89=36 I C 299=43 I A 269=19 O C 290=38 All 552 (P C).

5. Mohammad Abdulsamad v. Kurban Hussain, (1904) 26 All 119=31 I A 30=7 O C 254=8 Sar 593 (P C).

provisions of the Act [*sc.* had they been in force at the time when the succession opened (per Lord Macnaghten in 31 I A 132[6] at p. 142,)] the consequence attached by the Section is that such person

shall have the same rights and powers in regard to the property .... and shall hold the same subject to the same conditions and to the same rules of succession

as the testator. In their Lordships' opinion this provision was intended to indicate how the Act was to take effect upon such property and not to perpetuate a system of succession under the bare terms of the original sanad and outside the main provisions of the Act. This is a question of the intention to be collected from the language used. The section is expressly dealing with a case in which the taluqdar has parted with his interest or part thereof prior to the Act. Whatever defects may be imputed to the draftsmanship of the Act and whatever their consequences, it is difficult to suggest that the statute designedly provided that estates should in some cases within S. 14, run for all time on the bare general principle provided by a sanad and that the reference to "rights and powers," "conditions" and "rules of succession" should in these cases import none of the elaborate provisions of the Act. No doubt some saving of vested rights may be implied in retrospective legislation, but subject to that the Section operates retrospectively as well as prospectively in order to achieve the same result for all estates of the same class. It operates alike whether the transferee is an heir apparent, another taluqdar or a younger son. In giving the other taluqdar the same rights as the transferor, the Act may have been unhappy, since the taluqas might not be subject to the same rules of succession. But the purpose of the section was to make the acquisition descend with the old estate. Likewise, the inclusion within the Section of persons who would have succeeded under the Act, is intended to preserve in such cases the same character to the estate as it would have continued to bear if the succession had been *ab intestato*. As explained by Lord Macnaghten in 31 I A 132[6] at p. 142 :

If a transfer or bequest is made to a person in the prescribed line of succession there is reason for placing the transferee or legatee in the same position with regard to succession to the estate as the transferor or testator; but if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the estate.

In their Lordships' view the effect of S. 14, was not to stereotype this estate as one which could never attract the course of succession prescribed by the Act, but on the contrary to put Randhir, though a devisee, under the operation of the Act as the holder of an estate within lists 1, 2 and 5. Whether or not S. 22 applies to his case of its own force, it is applied by S. 14. On this view Rani Deo Kuar was in 1906 the rightful successor to her husband under Cl. (7) of S. 22. The Crown Grants Act of 1895 does not abrogate the Act of 1869 and has no bearing on the matter. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellants—Nehra & Co.

Solicitors for Respondents —
Hy. S. L. Polak & Co.

6. Thakurain Balraj Kunwar v. Rai Jagatpal Singh, (1904) 26 All 393=3 I C 359=31 I A 132=7 O C 248=1 A L J 884 (P C).

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(*From Calcutta*)

1st February 1938

LORD RUSSELL OF KILLOWEN, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Messrs P. C. Mullick and another — Appellants.

v.

Commissioner of Income-tax, Bengal — Respondent.

Privy Council Appeal No. 32 of 1937.

(a) Income-tax Act (1922), Ss. 16, 40—Question of assessment of income of executors under will treated all along that it was assessment of executors' income—It cannot be urged in appeal before Privy Council that assessment should be treated as assessment upon them as trustees.

Where the question of assessment of the income of certain executors appointed under a will has all along proceeded and been argued by both the sides upon the footing that assessment was an assessment of executors' income, it is not open to the executors to urge before their Lordships of the Privy Council that the assessment should be treated as being not an assessment upon the executors in regard to the income of the executors but an assessment upon them as trustees under S. 40, when there is no evidence to show that at the relevant date the estate had been cleared and was held by the executors as trustees and the indications are all the other way.

[P 120 C 2]

(b) Income-tax Act (1922), S. 16—Testator directing executors to pay certain sum out of income of his property for expenses of his 'sradh' and also costs of taking out probate of his will—In computing chargeable income of executors, no part of income allocated for 'sradh' is to be excluded nor even costs of taking out probate.

Where a testator directs his executors to pay a certain sum out of the income of his property for the expenses of his "sradh" and also the costs of taking out the probate of his will, the Income-tax Officer, in computing the chargeable income of the executors, should not exclude any part of the sum allocated by the testator for his "sradh" or the costs of obtaining probate of the will, as the payment of these items are payments made out of the income of the estate coming to the hands of the assessees as executors and in pursuance of an obligation imposed by the testator. It is simply a case in which the executors having received the whole of the income of the estate apply a portion of it in a particular way pursuant to the directions of the testator in whose shoes they stand : *A I R 1933 P C 145, Disting.* [P 120 C 2; P 121 C 1]

L. P. E. Pugh and W. Wallach — *for Appellants.*

Hubert Hull — *for Respondent.*

Lord Russell of Killowen. — The executors of a testator (one Akshoy Kumar Ghose, deceased) appeal from a judgment of the High Court of Judicature at Fort William in Bengal delivered on a reference by the Commissioner of Income-tax under S. 66, sub-ss. 1 and 2, Income-tax Act. The testator died in October 1931. By his will he appointed the appellants (and another) his executors. He directed them to pay his debts out of the income of his property, and to pay Rs. 10,000 out of the income of his property on the occasion of his "Addya Shradh" for expenses in connexion therewith to the person entitled to perform the Shradh. He also directed his executors to pay out of the income of his property the costs of taking out probate of his will. After conferring out of income benefits on his second wife and his daughter and (out of the estate) benefits on the sons, if any, of his daughter, and after providing for the payment out of income "gradually" of diverse sums to some persons, and certain annuities to others, he bequeathed all his remaining property (in the events which happened) to a son taken in adoption after his death by his wife, viz. one Ajit Kumar Ghosh who is still a minor. The title of the son is defeasible in the event of his dying childless during lifetime of the testator's wife, and until he attains the age of 25 years the property has to remain in the possession of the executors who are to defray the expenses of education, maintenance and other necessary expenses out of the income of the estate. By an assessment order dated 26th October 1933, the executors were assessed to income-tax for the year 1933-34 in respect of their income of the previous year. During that year (viz., 1932-33) the executors had expended a sum of Rs. 5537 for expenses in connexion with the "Addya Shradh" and a sum of Rs. 1,25,000 for probate duty. They had also during the same period made certain payments to the persons entitled under the will to "gradual" payments and annuities. The Income-tax Officer assessed the income of the appellants of the year 1932-33, liable to tax for the year 1933-34, at Rs. 81,078.

He arrived at this figure by the following procedure: He ascertained the total taxable income received during the relevant year as amounting to Rs. 1,89,901, and the agricultural income (within the meaning of S. 4 (3) (viii) of the Act) so received at Rs. 90,015. He next ascertained the obligations which fell to be discharged by the executors during the year out of the income of the testator's estate. These obligations (which he termed "charges") were of different kinds. Some arose under the will of the testator's father; others consisted of the annuities payable under the testator's will and of the payments actually made during the year in respect of the sums thereby directed to be paid "gradually". These "charges" he treated (being, as he thought, bound to do so by the decision in 60 I A 196,[1] as of such a nature that the moneys required to meet them could not be regarded as income of the appellants. But, since the "charges" were payable out of the whole income whether taxable or not, he apportioned the "charges" between the taxable income and the agricultural income, allocating the sum of Rs. 35,520 to the taxable income with the result that of the said sum of Rs. 1,89,901 he treated only the sum of Rs. 1,54,381 as income of the appellants. This amount he further reduced by making deductions in respect of the Rs. 5537 expended during the year in respect of the testator's "Addya Shradh". Certain other adjustments had to be made (chiefly concerned with outgoings in respect of house property) which further reduced the sum of Rs. 1,54,381 to a sum of Rs. 1,22,396.

1. Bejoy Singh Dudhuria v. Commr. Income-tax, Calcutta, (1933) 20 A I R P C 145=143 I C 145=60 Cal 1029=60 I A 196 (P C).

This he fixed as the "total income" of the executors. He then deducted from that total income so much thereof as was represented by interest on securities and dividends taxed at the source and assessed the executors as liable to pay tax on the balance. He refused to treat the expenses of probate as one of the "charges", the amount of which could not be regarded as income of the executors, and accordingly made no allowance or reduction in respect thereof. On appeal to the Assistant Commissioner the total income liable to tax was reduced to a sum of Rs. 59,344. The reasons for this reduction are immaterial, because upon all the points involved in the present appeal the Assistant Commissioner agreed with the course adopted by the Income-tax Officer.

The executors then applied to the respondent to refer five questions of law to the High Court under S. 66 (2) of the Act. The respondent, for reasons which need not be specified, only referred three of the questions, but added an additional one on his own motion under S. 66 (1).

The questions so referred were as follows :—

Question 1. — Whether or not in computing the chargeable 'income' the whole of the amount (Rs. 10,000) provided in the Will of Akshoy Kumar Ghosh as payable 'out of income' on account of his 'sradh' should have been left out of calculation, and not merely the actual amount paid in the year of assessment on account of the same (Rs. 5537)?

Supplementary Question. — Whether in computing the income chargeable to tax in this case, the Income-tax Officer should, on a proper application of the law, have excluded no part of the sum of Rs. 10,000?

Question 2. — Whether or not the costs of obtaining probate of the Will of Akshoy Kumar Ghosh should have been excluded from the chargeable 'income' of the assessees, particularly in view of the express provisions in the Will and the same shall be payable out of the income?

Question 3. — Whether or not the assessees were entitled to credit for the full amount of deductions of tax at source on account of securities and dividends, without any abatement in respect of the proportionate amount of charges allocated to and allowed against the total receipts from such sources?

The respondent as provided by S. 66, expressed his own opinion which was in all respects adverse to the contentions of the executors. Both members of the High Court held as regards question 1 and the supplementary question that no part of the income of the executors applied for expenses in connexion with the Addya Shradh should be left out of account in computing the taxable income of the executors and that no allowance or deduction should be made in respect thereof. As regards question 2 both members of the High Court were of the like opinion as regards the costs of probate. As regards question 3 the Chief Justice thought that the question was one of fact and should not have been referred. Costello J. held that upon the facts when ascertained the executors had no ground for complaint. The third question was accordingly not answered by the High Court. The executors have appealed to His Majesty in Council, and in the course of the argument a point arose which must be dealt with in limine. It was suggested that the assessment should be treated as being not an assessment upon the executors in regard to the income of the executors, but an assessment upon the appellants as trustees (under S. 40 of the Act) for the residuary beneficiary Ajit Kumar Ghosh. In their Lordships' opinion this contention is not open to the appellants. The matter has all along proceeded and been argued by both sides upon the footing that the assessment was an assessment of executors' income. There is no evidence that at the relevant date the estate had been cleared and was held by the appellants simply as trustees; indeed the indications are all the other way. It is true that the assessment order refers to the infant son as the sole beneficiary. It is also true that in some respects the procedure adopted by the Income-tax Officer is logically more applicable to the ascertainment of residuary income than to the calculation of the total income of an estate, a fact which in all probability is the result of a desire on the part of the authorities to act with fairness to all concerned. But however that may be the assessment in its present form stands, subject only to the question which their Lordships have to decide, viz. whether the High Court has correctly answered the questions submitted to it. Their Lordships agree with the answers given to question 1, the supplementary question, and question 2. The payment of the Shradh expenses, and the costs of probate were payments made out of the income of the estate coming to the hands of the appellants as executors, and in pursuance of an obligation imposed by their testator. It is not a case (like the case in 60 I A 196[1]) in which a portion of income was by an overriding title diverted from the

person who would otherwise have received it. It is simply a case in which the executors having received the whole income of the estate apply a portion in a particular way pursuant to the directions of their testator, in whose shoes they stand.

As regards question 3, their Lordships think that it might well have been answered in the negative. It appears to have been based upon a misunderstanding by the appellants of the situation. Had they been in fact charged with any tax deducted at source they would have been entitled to credit for that amount ; but in fact the whole of the sums in respect of interest on securities and dividends which were brought in as gross for the purpose of ascertaining the total income of the executors, was deducted for the purpose of fixing the income on which tax was to be charged. They have not been charged with any tax deducted at source. Their Lordships are of opinion that this appeal fails and should be dismissed. They will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

R.M./R.K. *Appeal dismissed.*

Solicitors for Appellants —
W. W. Box & Co.

Solicitors for Respondent —
Solicitor, India Office.

A. I. R. 1938 Privy Council 121
(From Peshawar)
31st January 1938
LORD MACMILLAN, SIR GEORGE LOWNDES AND SIR SHADI LAL.
Lala Karam Chand and another — Appellants.

v.

Firm Mian Mir Ahmad Aziz Ahmad and another — Respondents.

Privy Council Appeal No. 6 of 1937.

Stamp Act (1899), S. 35—Documents running as follows—"Received from you this day . . . . . cheque for Rs . . . . Amount would be repaid with interest. Principal amount will be paid with interest after ten months from this date" —Held that documents were not promissory notes and were not inadmissible in evidence for want of stamp — They could be relied on to show real nature of transaction.

In a suit based on a sitta or an agreement of sale, the meaning of which was obscure, the claim was supported by copies of two documents each of which ran as follows :

"Received from you this day . . . . . a cheque for Rs . . . . . The amount would be repaid with interest thereon at the rate of . . . . . per. cent. Time ten months. The principal amount will be paid with interest after ten months from this date."

The defendants pleaded that the documents were promissory notes and not being stamped were inadmissible in evidence and no suit could be based on them :

Held that the documents were clearly never intended to be negotiable instruments and were not promissory notes and were not therefore, inadmissible in evidence for want of a stamp, and they could be relied upon to show the real nature of the transaction and that all the documents being before the Court there was no question of the defendants being prejudiced by the defective form of the plaint. [P 123 C 1]

A. M. Dunne and W. Wallach — *for Appellants.*

J. M. Parikh — *for Respondents.*

Sir George Lowndes.—The suit out of which this appeal arises was instituted by the appellants in the Court of the Senior Subordinate Judge of Peshawar, claiming payment by the respondent, sued both as a firm and individually, of Rs. 27,867.8.0 with further interest until realisation. The foundation of the claim was alleged in the plaint to be a sitta or agreement for sale in the following terms :

That on the 5th of Asuj (a Hindu month) Sambat (Hindu era), 1986, corresponding to 27th September, 1929, the parties entered into an agreement as given in the sitta (agreement to sell) (copy attached) through Sant Amir Chand, broker, as under :

'Sale to R. B. L. Karam Chand Jagat Ram of 200 boxes of tea to be imported from Shanghai. Tea to be sent for by the receiver (of money) himself. Receiver himself to be responsible for profit and loss. Interest at the rate of Rs. 11-4-0 p. a. Time ten months.'

This document in itself, the meaning of which is, to say the least of it, obscure, obviously laid no foundation for the money claimed by the plaintiffs, but it was further alleged that "for the completion of the agreement" the plaintiffs paid to the defendants by cheques on different banks two sums of Rs. 10,000 each on 20th September and 8th October 1929, respectively, and that "the defendants gave other documents by way of memos to the plaintiffs" of which copies were attached to the plaint. The Rs. 27,867-8-0 were said to be the Rs. 20,000 so paid together with interest for the 10 months and at the rate of 11¼ per cent. referred to in the sitta. The other documents referred to were two which appear in the record as plaintiffs' Exs. B and C. They purport

to be signed by the respondent firm and (transcribing only the material portions in each case) run as follows :

Received from you this 5th day of Asuj, 1986, Sambat corresponding to 20th September, 1929, a cheque for Rs. 10,000 drawn by you on Messrs. Grindlay & Co., Ltd., Peshawar. The amount would be repaid with interest thereon at the rate of Rs. 11-4-0 p. c. Time ten months. The principal amount will be paid with interest after ten months from this date.

Received from you this 23rd of Asuj, 1986, Sambat corresponding to 8th October, 1929, cheque No. 50284 dated 8th October for Rs. 10,000 drawn on the Imperial Bank of India, Limited, Peshawar. The amount to be paid back with interest at the rate of Rs 11-4-0 p c. after ten months.

This principal amount with interest thereon to be repaid after ten months from this date.

The respondents put in a written defence pleading inter alia that one of the defendants named was not a partner ; denying that the sitta was a completed contract and denying that any payment was made to them in pursuance of it. They also pleaded that "the documents the copies of which had been produced by the plaintiffs (meaning thereby the sitta and the two documents abstracted above) amounted to pronotes and by reason of their being inadmissible in evidence no suit could be based thereon." This last plea was founded on the fact that none of these documents were stamped and if they were held to be promissory notes, S. 35, Stamp Act precluded their admission in evidence for any purpose. This Act adopted the definition of a promissiory note contained in the Negotiable Instruments Act, 1881, S. 4—which runs as follows :

4. A 'promissory note' is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

The suit went to trial in due course and issues were raised—

1. Did the defendants' firm agree to borrow money from the plaintiffs and executed the sitta dated 20th September, 1929 ? 2. Are the plaintiffs entitled to recover (Rs. 20,000 principal and Rs. 7867-8-0 interest) ? 3. Are the documents annexed to the plaint admissible in evidence ? 4. Is the suit bad for misjoinder of plaintiffs ? 5. Is Abdul Aziz defendant a partner in the defendants' firm ? 6. To what are the plaintiffs entitled and against whom ?

The plaintiffs' case was supported by the evidence of the head of their firm and the broker through whom the transactions were negotiated and in whose books the sitta was entered. The Subordinate Judge delivered his judgment on 29th November 1934, affirming the appellants' claim and passed a decree in their favour of the same date for Rs 27,867.8 0 and costs. On the third issue he held that the sitta was not a promissory note and admitted it in evidence on payment of a penalty. He however made no pronouncement as to the other two documents, not apparently, considering them to be material to the plaintiffs' claim. He found all the other issues in the plaintiffs' favour. The present respondents (the defendants in the suit) appealed from this decree to the Court of the Judicial Commissioner N. W. Frontier Province, who, on 2nd October, 1935, reversed the decree of the lower Court and dismissed the suit with costs. The principal argument before the Appellate Court was as to the two documents, exhibits B and C. It was urged that the suit should have been based upon them and not upon the sitta, and that the reason for not doing so was that they were in fact promissory notes, and not being properly stamped were inadmissible in evidence. The learned Judicial Commissioners acceded to this contention. They say :

On giving the matter our careful consideration we have come to the conclusion that the position taken up by counsel for appellants is sound. The sitta does not mention the sum to be advanced; it forms only a preliminary stage of the negotiations. The payment of money and the obtaining of necessary documents for its repayment are in fact the steps which come in for consideration. The cheques undoubtedly proved payment, but mere payment by cheque does not per se give a cause of action for claiming the money back. It does not prove that the amount had been advanced as a loan. The only documents which could have supported the claim and formed its foundation were therefore those which were finally handed over and in which the defendants undertook to repay the money with interest after ten months. Plaintiffs have deliberately avoided to found their case on them.

The judgment did not decide in so many words that the two documents in question were promissory notes, but there is no doubt that when their judgment was pronounced there was a strong current of authority in India to the effect that documents of this character containing a promise to pay (and it could hardly be contended that those under consideration did not contain such a promise) came within the ban of S. 35, Stamp Act. The Judicial Commissioners evidently thought — and their Lordships are inclined to agree — that the plaintiffs were afraid to found their suit upon exhibits B and C for

fear they should be held to be within the ban and that they did "deliberately avoid", as the judgment said, to do this, and they could not be allowed to succeed upon the basis merely of the sitta and the cheques. Their Lordships think that on the supposition that the two documents in question were inadmissible in evidence there was much to be said for this view. What the sitta meant in itself is extremely doubtful. It purports to be an agreement for the sale of tea to the plaintiffs, and the plaintiff himself in his evidence says that this was the intention, though his counsel strenuously denies it. But in any case it was in itself an incomplete record of the transaction between the parties and it alone cannot validate the claim for Rs. 27,867-8-0, nor would the mere receipt of the two cheques which were proved in the case help to do so. The missing link between the two showing what the real agreement between the parties was could only be supplied by exhibits B and C and apparently the law refused to sanction the completion of the chain.

But since the judgment of the Judicial Commissioner's Court, a decision of this Board, 63 I A 279,[1] has made it clear that the shadow resting upon these exhibits throughout the case was unreal; that documents of this nature which were clearly never intended to be negotiable instruments at all are not promissory notes and are not therefore, for want of a stamp, inadmissible in evidence. If this decision had been before the learned Judicial Commissioners, their Lordships doubt if they would have come to the conclusion they did. They would, it may be admitted, have had before them a plaint inartistically drawn and seeking to rest a justifiable claim upon an unjustifiable basis, but even so, they would probably have hesitated in the Frontier Province to give more importance to form than to substance. The object of pleading is to give fair notice to each party of what his opponent's case is, and all the documents being from the beginning before the Court there was no question of the defendants being prejudiced by the form of the plaint. The necessary deduction from all the documents read together with the oral evidence could, their Lordships think only be that the conclusion come to by the trial Court was right.

It has been suggested before the Board that exhibits B and C were only copies of the original documents and therefore ineffective as evidence. Their Lordships would not be prepared to hold that this suggestion is borne out by the record, but the point was not taken in the Courts in India and they must, therefore, hold that it is not now open to the respondents. The only other defence which has been raised to the appellants' claim was as to the liability of the respondent Aziz Ahmad as a partner. This was not dealt with by the learned Judicial Commissioners and their Lordships have no doubt that the finding of the Subordinate Judge that he was a partner of the defendants' firm was amply justified. For the reasons given above, their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Judicial Commissioners should be set aside and that of the Subordinate Judge restored. The respondents must pay the appellants' costs both in the High Court and before this Board.

R.M./R.K. *Appeal allowed.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.
Solicitors for Respondents —
T. L. Wilson & Co.

1. Mohammed Akbar Khan v. Attar Singh, (1936) 23 A I R P C 171=162 I C 454 = 63 I A 279=17 Lah 557 (P C).

*** A. I. R. 1938 Privy Council 123**

(*From Madras*)

27th January 1938

LORD MACMILLAN, LORD ROCHE AND SIR GEORGE RANKIN.

R. Shanmuga Rajeswara Sethupathi — Appellant.

v.

Chidambaram Chettiar and others — Respondents.

Privy Council Appeal No. 51 of 1934.

(a) Promissory note—Consideration— Onus is upon executant to prove that there was no consideration.

Where a promissory note has been given, consideration is to be presumed and the burden to prove that there was no consideration for the promissory note is upon the executant.

[P 125 C 1, 2]

*** (b) Transfer of Property Act (1882), S. 6 (d) — Settlor reserving allowance to himself for maintenance from trust property — Such allowance does not come under Cl. (d).**

A Raja who was an owner in full right of certain property granted it to a trustee upon trust inter alia to pay him certain allowance per month from

th trust property explaining in the settlement deed that it was for the purpose of making provision for his maintenance:

Held that such allowance was not a 'restricted'' interest in the sense of Cl. (d) and hence Cl. (d) did not apply. [P 126 C 1, 2]

✲ **(c) Mortgage—Election — Hypothecation bonds — Subsequent new mortgage in favour of same mortgagee in place of hypothecation bonds — Suit on subsequent mortgage — Subsequent mortgage found to be invalid therein — Mortgagee can sue on old hypothecation bonds — Mortgagor cannot claim benefit of subsequent mortgage as release of hypothecation bonds.**

An owner of property granted it to a trustee on trust The trust deed provided that the trustee should pay the settlor certain allowance per month for his maintenance and should also pay the debts due by the settlor on the date of the deed. The owner subsequently executed three hypothecation bonds. By one of the bonds he hypothecated the allowance provided by the settlement deed. Later on the trustee executed a new mortgage in favour of the same mortgagee comprising the debts due by the settlor prior to the settlement deed as well as subsequent to it. The mortgage deed provided that from its date the mortgagee's charge on the settlor's allowance was to cease but apart from that the mortgagee's rights already existing for recovery of the whole or any portions of the amount secured by the mortgage deed would not be affected by the mortgage deed. In a suit by the mortgagee on the new mortgage it was found that the said mortgage was invalid. He therefore sued on the basis of the old hypothecation bonds. The mortgagor contended that the mortgagee lost his rights to have recourse to the hypothecation bonds by reason that he elected to bring a suit upon the new mortgage:

Held that the mortgagor could not claim the benefit of the new mortgage as a release of the hypothecation bonds so far as the allowance was concerned He could not single out a particular clause of the new mortgage deed and claim that the release of the charge upon the allowance was a valid and subsisting release : *A I R 1916 P C 68, Rel. on.* [P 127 C 2]

Held further that the hypothecation bonds apart from the allowance were cumulative and independent securities from the new invalid mortgage. No question of election could arise as between those securities even on the hypothesis that the latter mortgage was valid; still less could it arise when it was set aside as invalid. The earlier bonds remained in force and maintained their rank notwithstanding the other and could be dealt with by the mortgagee separately : *(1843) 2 Y & C C C 354 and 93 All 313 (PC) Rel. on.* [P 127 C 2]

(d) Pleadings—Amendment—Hypothecation bonds executed by mortgagor in favour of another — Subjects hypothecated being certain jewels already in pledge to certain money-lender of mortgagor—Suit to enforce hypothecation bonds — Plaintiff on date on which judgment was reserved asking to amend his plaint by adding that mortgagor's son should pay money-lender his debt and in default plaintiff should pay it and sell mortgagor's property to satisfy the amount — Amendment asking for such relief held should not have been allowed at the end of trial.

A mortgagor executed certain hypothecation bonds in favour of another. The mortgaged subjects under some of the bonds were certain jewels which were already in pledge to certain money-lender of the mortgagor. A suit was brought to enforce the hypothecation bonds and on the date on which the judgment was reserved, the plaintiff asked leave to amend his plaint by adding a prayer that the son of the deceased mortgagor be ordered to pay to the mortgagor's money-lender his debt in respect of which that money lender had obtained the jewels in pledge; or in the alternative that on the plaintiff paying off the money-lender, the plaintiff be declared to be entitled to sell the mortgagor's property to realise the said amount. The Court granted the amendment. The result was to make the mortgagor's property liable for the whole of the plaintiff's claim upon the hypothecation bonds:

Held that the relief of so wide and exceptional a nature should not have been entertained by way of amendment at the end of the trial and that the plaintiff's endeavour to make mortgagor's estate responsible for the debt due to him upon the bonds must be rejected. [P 129 C 1]

(e) Mortgage — Interim interest.

Where there has been a great accumulation of interest, the Judge is well entitled to exercise his discretion by making an unusual order as regards interim interest, viz. at 6 per cent. on principal money only both between the date of suit and date of decree and between the date of the decree and the date of payment. [P 129 C 1]

Sir Herbet Cunliffe, A. C. Sampath Ayyangar and S. P. Khambatta—*for Appellant.*

A. M. Dunne and P. V. Subba Row — *for Respondents*

Sir George Rankin.—In this case three appeals have been consolidated : two of these relate to minor questions as to interest, but the main appeal [C. M. P. No. 4220 of 1928] raises questions of more importance. These arise out of a mortgage suit brought on 15th April 1905, in the Court of the Subordinate Judge of Madura. The appellant in the main appeal (herein called "the appellant") is the grandson of the original mortgagor, whose eldest son, the appellant's father, was defendant 1 to the suit. This defendant died pending suit and the appellant now represents the mortgagor: on one point, to be mentioned later, he has independent interests of himself and of his father to defend. Respondents 8 to 11 are the contesting respondents to the main appeal. They are the representatives of the original plaintiff in the suit Subramaniam Chettiar who had succeeded his

father Ramanathan Chettiar the original mortgagee. The decree dated 12th September 1917 of the trial Judge was modified in certain respects by the High Court of Madras whose decree, dated 26th April 1928, disposed of eleven appeals brought by divers parties. Their Lordships are concerned with two only of the appeals brought to the High Court—Appeal No. 26 of 1918 by the present appellant and Appeal No. 106 of 1918 by the plaintiff. The suit was brought to enforce three securities described as hypothecation bonds or deeds, the first being dated 21st November 1895; the second 7th November 1896, and the third 25th November 1896. They were given to Ramanathan Chettiar by the appellant's grandfather, the then Raja of Ramnad for the sums of Rs. 24,000, Rs. 71,000 and Rs. 35 000, respectively, amounting to Rs. 1,30,000. Interest on each bond was at the rate of 12 per cent. per annum, but in the case of the first two bonds only this was to be calculated as compound interest with annual rests from the date of default. The mortgaged subjects under the first and second bonds were certain jewels already in pledge to a moneylender named Anamalai and the Raja's allowance of Rs. 5500 per annum under a trust deed of 12th July 1895, executed by himself as hereinafter mentioned. Under the third bond, the jewels together with certain furniture as to which no question now arises, were the security.

Objection has been taken by the appellant to the plaintiff's right as mortgagee under these bonds to the principal sum of Rs. 1,30,000 claimed. It is said that Rs. 15,000 thereof comprised in the sum of Rs. 71,000 mentioned in the second bond, is without consideration, being the amount of a statute-barred debt of the Raja's father for which, on 25th November 1895, the Raja had given a promissory note. The objection on behalf of the appellant is that by the Raja's evidence, given on commission in January 1903, it is proved that the promissory note was given, but it is not proved that there was any stipulation for a fresh advance, and that accordingly this portion of the principal amount of the second bond is not recoverable unless, indeed, it be brought within Cl. 3 of S. 25, Contract Act. It is contended that it is not within this clause as it was not a debt of the mortgagor but of his father. Their Lordships are of opinion that the Courts in India have rightly rejected this objection. A promissory note having been given, consideration is to be presumed. The question is not therefore whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the appellant that there was no consideration for the promissory note. This burden, the appellant has certainly not discharged, and there is every probability against him on the point. It is not necessary therefore for their Lordships to decide whether under Cl. 3 of S. 25 above mentioned a debt of which the creditor might have enforced payment from the mortgagor would be excluded by the circumstance that it was not a debt of his own. Their Lordships must not be taken to cast doubt upon the view taken by the High Court if this question, which does not arise, is not now discussed. Their Lordships are satisfied that the principal amount due on the bonds in suit is Rs. 1,30,000 as decreed by the Indian Courts.

The next question is whether the bonds in suit confer a valid charge upon the jewels and the allowance already mentioned. On this point, it is necessary to refer to the settlement of 12th July 1895 (herein called "the settlement"). The then Raja had become heavily involved in debt a list of his creditors is given in Sch. 3 to this deed showing that he was indebted in a total sum of Rs. 20 lacs. His impartible zamindari of Ramnad was of great extent, covering no less an area than 2351 square miles. This and much other property, aggregating in value 50 lacs of Rupees, he conveyed to a trustee for the benefit of his heir apparent and eldest son, then a minor, and for the purpose of making provision for the maintenance of the settlor and several members of his family as mentioned in Sch. 2. The trustee was directed to pay Government revenue, certain expenses of management, of litigation and of repairs: in the fifth place he was directed to apply moneys in his hands to the payment of the interest on and principal of the debts mentioned in Sch. 3, and thereafter of the allowances mentioned in Sch. 2. It was provided that on the settlor's eldest son attaining the age of 21, the trustee should convey the trust premises, then existing, to him for the same estate as if he had inherited them, but subject to the several payments directed by the deed and to the several trusts

which should then be subsisting in respect thereof. The first of the allowances mentioned in Sch. 2 is the allowance of Rs. 5500 per month to the settlor himself. In Sch. 3 among the creditors is mentioned the plaintiff's father Ramanathan (Muthia) Chettiar as a creditor for Rs. 1,30,000: this debt is entirely independent of the sum of Rs. 1,30,000 due upon the bonds now in suit. The creditor Anamalai is also mentioned as a creditor for Rs. 75,000, but in this deed there is no mention of the circumstance that Anamalai was a pledgee of any jewels.

The appellant contends that although the jewels are not specifically mentioned in the deed of 12th July 1895, the wide language of Clause 5 thereof is sufficient to comprise these jewels in view of the fact that the right of the Raja was a mere right to redeem. Clause 5 is very lengthy: upon examining it, their Lordships are of opinion that the jewels are not within its language. They are not "claims now due, owing or payable" and the general language as to "all rights to prosecute any suit or other proceeding" and as to securities for money, furniture, fixture and other articles in the offices of the zamindari are, in their Lordships' opinion, inapplicable to them. The settlor was the owner of these jewels although he had made a bailment of them by way of pledge. Having regard to their value, their importance to the settlor, and the nature of his property in them, their Lordships have no difficulty in agreeing with the Courts in India that the jewels were not comprised in the settlement. They see no reason therefore why the settlor should not include them in the hypothecation bonds in suit. A second question upon the settlement deed is whether or not the Raja's monetary allowance of Rs. 5500 described by Clause 3 as being for the purpose of making provision for the maintenance of himself, comes within Clause (d) of S. 6, T. P. Act, as it stood in 1899. Clause (dd) was inserted by the Legislature in 1929 and does not apply in the present case. Clause (d) runs as follows :

> An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

In the present case the Raja was an owner in full right of certain property; this he granted to a trustee upon trust inter alia to pay him this allowance of Rs. 5500 per month, explaining no doubt in the deed that it was for the purpose of making provision for his maintenance. In their Lordships' opinion, this is not a 'restricted' interest in the sense of Clause (d): whatever difficulty might arise upon the newer clause which uses the phrase "a right to future maintenance in whatsoever manner arising, secured or determined" their Lordships are satisfied that they would be giving much too wide an application to Clause (d) if the present case were held to come within it. They think, accordingly, that the hypothecation bonds create a valid charge on the allowance.

A still further attack is made by the appellant upon the bonds in suit. This arises out of the fact that on 6th July 1899 (Ramanathan Chettiar having died in 1898) the trustee under the settlement of 1895 executed in favour of Subramaniam Chettiar a mortgage deed for a sum of Rs. 4,73,000 intended to comprise the sums due by the Raja prior to the date of the settlement deed, and the further sums which had been subsequently borrowed. On 13th July 1899, another mortgage, called the 'paddy' mortgage, was given to secure the payment of Rs. 30,000 out of an amount of Rs. 50,000 which by the mortgage of 6th July 1899, was to have been paid within a week thereof. These mortgages were given in compromise of a suit brought in 1897 by Ramanathan Chettiar attacking the validity of the settlement of 12th July 1895. By 7th October 1899, the trustee had paid to Ramanathan Chettiar, or to his son who had succeeded him, the full amount with interest due upon the debt which the Raja had owed to Ramanathan Chettiar at the time of the settlement deed. He had not however discharged any portion of the debt which had been incurred after the date of the deed, save that Ramanathan had been paid Rs. 20,000 in cash and had received a certain amount under the paddy mortgage, which sums were in discharge of the Raja's post settlement indebtedness. In this state of affairs Subramaniam Chettiar filed two suits on 30th January 1900, to enforce his securities under the mortgage of 6th July 1899, and the paddy mortgage of 13th July 1899, in order that he might recover the balance of the debt incurred by the Raja after the settlement. The Raja's son however counter-attacked by bringing a suit (No. 6 of 1902) against Ramanathan's representatives and the

trustee to obtain a declaration that the mortgages of 6th and 13th July 1899, were invalid as against the settled estate. This suit succeeded in the Courts in India and also on appeal to His Majesty in Council (16th November 1915): [*cf.* 39 Mad 115[1]]. Subramaniam was directed to repay the sum of Rs. 39,087, namely the sum of Rs. 20,000 cash and what he had received under the paddy mortgage. The sum of Rs. 87,421 which he had received in respect of his pre-settlement debt on 7th October 1899, he was not ordered to refund. It was within the terms of the settlement that this indebtedness should be discharged; the mere circumstance that it might not have been paid so soon had he not been willing to enter into the mortgages of July 1899 was not counted a sufficient reason for ordering that he should refund this money. The contention of the appellant is that in these circumstances the plaintiff Subramaniam Chettiar, lost his right to have recourse to the hypothecation bonds in suit by reason that he elected in 1900 to bring a suit upon the mortgages of July 1899. Clause 12 of the mortgage of 6th July is as follows :

12. Except as hereunder provided your rights already existing for recovery of the whole or any portion or portions of the amount secured by this deed shall not be affected by this deed. That from this date your lien or charge on the allowance due to the Raja M. Bhaskara Sethupathi Avargal, under the said settlement deed for any portion or portions of the amount due under this deed shall cease. On the payment of the sums of Rs. 1,81,727-0-2 and Rs. 1,25,000 with interest on the said two sums as mentioned in paras. 5 and 6 of this deed, all other securities other than the securities created by this instrument shall cease.

The first question upon this clause is whether the plaintiff's charge on the Raja's allowance was intended to be released whether or not the mortgage was valid, that is whether he gave up his old security on the footing that he was getting a new one or taking a chance that he might not get a new one. In their Lordships' opinion the intention of the plaintiff was entirely frustrated by the fact that the mortgage of 6th July 1899 turned out to be invalid and was set aside. While it is possible to put a case in which a mortgagee releases one security unconditionally with an intention to take the risk of a new security turning out to be invalid, there are no facts in this case pointing to so unusual a bargain. The result is that this contention as to the allowance fails. The case in 44 I A 60[2] furnishes a complete answer to the suggestion that a beneficiary under the trust can claim the benefit of the mortgage of 6th July 1899, as a release of the hypothecation bonds so far as the allowance is concerned. The appellant's contention that because the plaintiff had received the amount that was due to him upon debts contracted prior to the deed of settlement and was not directed to refund it when the Raja's son elected to avoid the mortgage he can now claim that the mortgage has not been altogether set aside, is a contention which their Lordships reject. The appellant cannot single out a particular clause of the mortgage deed and claim to hold the plaintiff by its terms and in this way maintain that the release of the charge upon the allowance is a valid and subsisting release.

It will be noticed that by cl. 12 it is expressly provided that the plaintiff's existing securities, apart from the allowance, should not be affected by the deed. By express agreement therefore the hypothecation bonds and the invalid mortgage of 6th July 1899, were to be cumulative and independent securities. No question of election could arise as between these securities, even on the hypothesis that the latter mortgage was valid; still less can it arise now that the mortgage has been set aside. As observed by the Vice-Chancellor in (1843) 2 Y & C C C 354[3] at p. 361, "the earlier mortgage remains in force and maintains its rank notwithstanding the other and may be dealt with by the creditor separately." The following passage from the Board's judgment (delivered by Lord Robertson) in 28 I A 203[4] at pp. 209-10, discloses perhaps a fuller answer to the appellant's argument in the present case :

If the bond of November 1883 be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the respondents was rather that the appellants by their suing on the bond of November and not on the bond of May, had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The appellants did not need to sue on the bond of May in order to obtain a sale for the whole of

1. Subramanian v. Raja Rajeswara Dorai, (1915) 2 AIR PC 33=32 IC 258=39 Mad 115 (P C).

2. Har Chandi Lal v. Sheoraj Singh, (1916) 3 A I R P C 68=39 I C 343=44 I A 60=39 All 178 (P C).

3. Miln v. Walton, (1843) 2 Y & C C C 354=7 Jur 892.

4. Shankar Sarup v. Mejo Mal, (1901) 23 All 313 =28 I A 203=8 Sar 72 (P C).

their debt, that being comprised in the bond of November. But in suing on the bond of November, they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation.

For these reasons their Lordships conclude that the plaintiff had a valid charge for the principal amount of his debt with interest upon the subjects comprised in the bonds in suit. The objections of the appellant on these points have been rightly overruled by the admirable judgment of the learned Subordinate Judge which the High Court upheld. In one matter however the appellant in their Lordships' view has made good a serious objection to the view taken by the Indian Courts The present suit was brought in 1905 and the issues in it were settled on 24th November 1906; additional issues on 3rd September 1910. The case was heard in 1917 and judgment was reserved on 25th August 1917. On that day a petition was presented by the plaintiff asking leave to amend his plaint by adding a prayer that defendant 1, that is the Raja's son, be ordered to pay to defendant 4, namely the representative of Anamalai, the amount due on account of the debt of Rs. 60,000 and interest in respect of which Anamalai had obtained the jewels in pledge; or in the alternative that on the plaintiff paying off Anamalai, the plaintiff be declared entitled to sell the settled property to realize the said amount. The learned Subordinate Judge took the view that the amendment asked for was formal and that if the plaintiff was entitled to the relief claimed on the facts already on record he should not be told that he had not asked for it and therefore could not be given it. The decree of the learned Subordinate Judge by its second clause directed the Raja's son to pay off Anamalai, whose debt of Rs. 60,000 with interest was held to have amounted to over 2 lacs; and ordered that in default the plaintiff should be entitled to have the settled property sold for satisfying the amount. He also directed that if defendant 1 did not pay off Anamalai, the plaintiff, on bringing the money into Court, should get the jewels and certain securities in the hands of Anamalai. The learned Judge proceeded on the basis of the doctrine of subrogation. The High Court on appeal discovered that Anamalai had by that time sold the jewels to liquidate his debt; they made no order accordingly in respect thereof and deleted from the decree of the Subordinate Judge his directions in that regard. Against defendants 1 and 2 as representatives of their father the original debtor, the High Court by Clause 1 of their decree gave judgment for the mortgage debt payable out of the assets, if any, of their father coming to their hands; and the decree by its second clause directed as follows:

(2) In default of defendant 1 paying as aforesaid within six months from 2nd March 1928 (26th April 1928) (the date of the High Court judgment) i. e. within 2nd September 1928 (26th October 1928), the plaintiff be entitled to apply to the Court to have the estate in defendant 1's hands or a sufficient portion thereof sold for satisfying the aforesaid sum mentioned in Cl. (1) above.

The result of this clause is to make the settled property liable for the whole of the plaintiff's claim upon his hypothecation bonds. As the property which came to the settlor's sons under the settlement deed of 12th July 1895, was not assets of the settlor at the date of his death, it is necessary to justify a direction which throw's the Raja's post-settlement debts upon the trust estate. The learned Judges of the High Court appear to have considered that the relation between Anamalai and the plaintiff was analogous to that of principal and surety, an analogy which in their Lordships' opinion, is entirely inapplicable to the present case. Their Lordships are unable to see any method by which it is possible to justify a decree making the trust estate liable for the whole of the plaintiff's debt; but it is contended on the part of the plaintiff's representatives that the Raja as settlor had a right against the trustee to require him to pay off the debt of Anamalai; that he had by the bonds in suit represented that the plaintiff would have a charge upon the whole value of the jewels as the trust estate would pay off Anamalai; that accordingly the plaintiff had the right as equitable assignee of the settlor to call upon the trustee to discharge Anamalai's debt and in this way to make available to the plaintiff the security which the Raja had agreed to give. Now it may or may not be that had such a cause of action been pleaded and had evidence been adduced to show what had been done by the trustee under the deed, what monyes were available to him, what obligations he had to provide for out of the settled property, what discretion he had exercised and so forth—it may be that a case could have succeeded on the lines suggested.

But such a case would require careful and timely pleading and a careful trial. It is in effect a charge of breach of trust having serious consequences both to the trustee and to other beneficiaries. It would be necessary to determine first whether the trustee was under any obligation to pay off Anamalai's debt save out of income of the property, and the course of administration of the trust in the events that happened would require minute examination. What has happened in this suit is that at the last moment an amendment was permitted under which in spite of the obvious objections to any such course, relief of so wide and exceptional a nature has been decreed without examination. The amendment authorized by the Subordinate Judge by his order of 28th August 1917 does not cover what the High Court have done. Their Lordships are of opinion that no such case should have been entertained by way of amendment at the end of the trial and that the plaintiff's endeavour to make the trust estate responsible for the debt due to him upon the bonds in suit must be rejected altogether.

It remains therefore that their Lordships should indicate the form of relief to which they think the plaintiff entitled. The first question on this point is as regards interim interest. For many years compound interest at 12 per cent. per annum must be decreed under the first and second of the bonds, and simple interest at the like rate under the third bond. This covers the period down to the institution of the suit. In view of the great accumulation of interest the learned Subordinate Judge was well entitled to exercise his discretion by making an unusual order as regards interim interest: he directed that interim interest should be at the rate of 6 per cent. on the principal amount only, both between the date of suit and date of decree, and between the date of the decree and the date of payment. The learned Judges of the High Court do not appear to have appreciated the exact effect of the trial Court's order which they varied by granting simple interest at 12 per cent. on the principal sum only from the date of the decree. Their Lordships do not think that there was any reason to interfere with the discretion of the trial Court and they prefer the order of the learned Subordinate Judge in all the circumstances of the case.

The result is that in their Lordships' view the appeal brought by Ramanathan Chettiar and others pursuant to special leave granted by Order in Council dated 10th June 1932, should be dismissed and the other two appeals (brought by the representative of defendant 1) should be allowed. The decree of the High Court should be varied so as to include simple interest at 6 per cent. on the principal amount of Rs. 1,30,000 from the date of the plaint to the date of payment. For the words "from the assets, if any, of the late Raja M. Bhaskara Sethupathi in the hands of defendants 1 and 2" should be substituted the words "from the assets, if any, belonging to the late Raja M. Bhaskara Sethupathi at the date of his death coming to the hands of defendants 1 and 2." This will make it clear that the judgment is intended to be in the form prescribed by S. 52, Civil P. C. Any question as to the liability of the sons for the Raja's debt by virtue of the doctrine mentioned in S. 53 of the Code remains unprejudiced by the decree in this case and must be dealt with if it arises in execution. Clause 2 of the High Court's decree should be altogether deleted. As all parties interested in the redemption of the jewels were impleaded in the suit, there should be liberty to the representatives of Subramaniam Chettiar to apply to the High Court within two months of the receipt by that Court of His Majesty's order upon this appeal to have an account taken of the sum due to Anamalai upon the security of the jewels and of the amount with which he should be debited as the proceeds thereof. It will be for the High Court to give directions for the taking of the necessary accounts and inquiries: the appellant as a party interested should have the right to take part in the proceedings, if any, but the liberty to apply should be given only to the representatives of Subramaniam. In other respects the decree appealed from should stand. Their Lordships will humbly advise His Majesty accordingly. The order of the Subordinate Judge as to the costs of the trial Court will stand as also the High Court's order as to the costs in Appeal No. 106. There will be no order for costs in the High Court in Appeal No. 26 and any costs paid in respect of that appeal under the High Court's decree should be returned. The parties will bear their own costs of all three appeals to His Majesty, but

this will not interfere with the direction contained in the Order in Council of 10th June 1932 as to the costs of the petition for special leave.

D.S./R.K. *Decree modified.*

Solicitors for Appellant —
Harold Shepherd.

Solicitors for Respondents —
Nehra & Co. and T. L. Wilson & Co.

***,* A. I. R. 1938 Privy Council 130**

(*From Calcutta : A I R 1936 Cal 753*)

17th February 1938

LORD WRIGHT, LORD ALNESS, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Babulal Chaukhani—Appellant.

v.

King-Emperor.

Privy Council Appeal No. 65 of 1937, Bengal Appeals Nos. 43 and 44 of 1936.

(a) Criminal P. C. (1898), S. 5 (1)—Language of Code is conclusive and must be construed according to ordinary principles.

The language of Code is conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail. [P 133 C 1]

(b) Criminal P. C. (1898), S. 239 (d)—Overt acts committed in pursuance of conspiracy to commit offences are committed in course of same transaction.

If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. [P 133 C 2]

*** * (c) Criminal P. C. (1898), S. 239 (d)—'Same transaction'— Determination of question.**

The relevant point of time in the proceedings at which the condition as to sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result : *30 Bom 49 and A I R 1929 Bom 128, Rel. on ; 29 Cal 385, Disting.* [P 130 C 2 ; P 133 C 2]

(d) Privy Council—Criminal appeal—Leave granted on certain ground—Other grounds cannot be argued.

In a criminal appeal to the Privy Council merely because special leave is granted on a certain ground, it cannot be said that the ordinary rules limiting the exercise of jurisdiction in criminal matters cease to apply; and hence other grounds cannot be argued, for the Judicial Committee is not a Court of criminal appeal : *A I R 1927 P C 44, Rel. on.* [P 135 C 1]

(e) Electricity Act (1910), Ss. 39 and 44 (c) — Offence falling under both sections — Charge under S 39 is proper if that offence is clearly established.

Where an offence falls under both Ss. 39 and 44 (c) the mere fact that a charge could have been made under S. 44 (c) does not prevent a charge made under S. 39 from being properly made especially where the offence under S. 39 is clearly established. S. 39 is in fact the major offence. [P 135 C 1, 2]

(f) Criminal P. C. (1898), Ss. 225 and 537—Misjoinder of charges — No miscarriage of justice—No interference.

Where offences which ought to have been separately charged are joined together but the specific offences are satisfactorily proved by competent evidence corroborated in all necessary respects and no miscarriage of justice is caused, the irregularity is cured under Ss. 225 and 537. [P 135 C 2]

Carden Noad and J. M. Pringle —*for Appellant.*

G. D. Roberts, W. Wallach and J. Megaw—*for Respondent.*

Lord Wright.—These two consolidated appeals depend substantially on the same issues of fact and involve the same questions of law. They were brought by special leave of His Majesty in Council in order to obtain a decision on the true effect of S. 239 (d), Criminal P. C., 1898, which provides that persons who are accused of different offences committed in the course of the same transaction may be charged and tried together. The question has been whether the correctness of the joinder which depends on the sameness of the transaction is to be determined by looking at the accusation or by looking at the result of the trial. Certain subsidiary questions have also been raised as affecting the validity of the trial and conviction. These are not matters which would justify special leave to appeal being granted upon the principles which this Board have adopted in guiding this discretion in criminal matters, and should not have been brought before this Board but as the questions have been raised, their Lordships will in due course shortly deal with them. The first appellant, Babulal Choukhani, has extensive business interests, including the ownership and operation under managers of the Bharat Lakhsmi Cinema at Calcutta. He was convicted of theft of electricity under S. 39, Electricity Act, 1910, and sentenced to fine and imprisonment. His conviction by the Magistrate for conspiracy was

quashed on appeal by the High Court. The second appellant was convicted of aiding and abetting the first appellant, the conviction given against him for conspiracy being likewise quashed. The separate thefts could only be treated in a case like this as forming part of the same transaction if they were unified as being overt acts done in pursuance of a conspiracy. The facts can be very shortly stated. The Calcutta Electric Supply Corporation were in the year 1934 concerned to find a discrepancy between units of energy generated and those accounted for by sales in excess of what would normally be experienced by the regular causes of wastage, such as transmission or conversion losses. Special inspectors of meters were appointed and in due course evidence of an extensive system of thieving was obtained. The method adopted was to tamper with the meters at consumer's premises in such a way as to conceal the fact of tampering. The actual work was done by skilled operatives, but their activities were organized by a number of individuals who approached the consumers and generally agreed to share with the consumers the amounts saved by the fraudulent alteration of the meter readings. They then employed and made terms with the actual tamperers. The second appellant was one of the organizers. The thefts which were charged against the first appellant were at his Cinema. The facts as to the actual theft were held to be proved both by the Magistrate and by the High Court. It is not now suggested there was no evidence to justify the findings on these matters.

In order to examine the main question of law which was raised, viz the construction of S. 239 (d), Civil P. C., it is necessary to trace in the briefest manner possible the course of the proceedings. On 17th November 1934, the Electricity Corporation having obtained sufficient prima facie materials to justify that course, lodged a complaint before the Chief Presidency Magistrate at Calcutta that their electricity was being stolen, with particular reference to the first appellant's Cinema and also to another cinema with which he was not connected. The police investigated the matter and on 29th January 1935, made a report to the Chief Presidency Magistrate naming 23 persons including the two appellants and accusing them of being parties to a criminal conspiracy at Calcutta, Howrah and other places in British India to commit theft of the Corporation's electric energy and of dishonestly abstracting and using electricity in pursuance of that conspiracy at the two cinemas and other places in British India. Mr. Sinha, the Chief Presidency Magistrate, who commenced the hearing on 29th January 1935, framed charges against 12 persons of the 23 persons accused, after hearing evidence in chief from 36 persons, the most important witnesses being three approvers. The charges framed against appellant 1 were as follows : (1) jointly with the other accused, including appellant 2 :

That you between January 1934, and 20th January 1935, at 2 and 2/1 Chittaranjan Avenue (Bharat Laksmi Picture House), Jupiter Cinema, 66/2 Beadon Street, Sealdah Hotel, 225 Harrison Road and other places in Calcutta, Howrah and 24-Perganas, along with Krishna Chandra Shome, Bholanath Chatterjee, Hardwar Singh, Aswini Kumar Panja, Nanilal Ghose alias Noni Mistri, Putu, Md. Abdul Azim and Bhudeb Chandra Seth and others were parties to a criminal conspiracy to commit theft (dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited by tampering with meters at the premises of the consumers and that in pursuance of the said conspiracy, theft of electric energy was in fact committed at Bharat Laksmi Picture House, Jupiter Cinema and other places and thereby committed an offence punishable under S. 120-B, I. P. C., read with S 39, Electricity Act, and S. 379, I. P. C., and within the cognizance of this Court.

(2) against appellant 1 alone :

That you between April 1934, and 16th January 1935, at Bharat Lakshmi Picture House situate at 2 and 2/1 Chittaranjan Avenue, Police Station Jorashanko, Calcutta, committed theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited and thereby committed an offence punishable under S 39, Electricity Act (9 of 1910) read with S 379, I. P. C. and within the cognizance of this Court.

Against appellant 2 there was in addition to the joint charge against all the accused, two other charges of which one is here material. This was as follows :

That you between April 1934 and 16th January 1935, at Bharat Lakshmi Picture House abetted Babulal Chowkhani in the commission of the offence of theft (by dishonest consumption or user of electric energy belonging to the Calcutta Electric Supply Corporation Limited which offence was committed in consequence of your abetment and you have thereby committed an offence punishable under S. 109, I. P. C read with S. 39, Electricity Act, (9 of 1910), and S 379, I. P. C., and within the cognizance of this Court.

These charges having been framed in, accordance with S. 254, Criminal P. C., the trial proceeded before the Chief Presidency Magistrate, who heard a great mass of evidence both for the prosecution and

the defence. On 6th June 1935, he delivered judgment, finding that the charge of conspiracy was proved against seven of the accused, including the two appellants, and acquitted the others. He found the charge of theft proved against appellant 1 and sentenced him to one year's rigorous imprisonment and a fine of Rs. 1000 on that charge. He passed no separate sentence on the charge of conspiracy. The Chief Presidency Magistrate found appellant 2 guilty of conspiracy and of abetment of theft, and sentenced him to two years' rigorous imprisonment on the latter charge. He passed no separate sentence on the charge of conspiracy. On a further charge in respect of a cinema other than that of appellant 1, the Jupiter Cinema, appellant 2 was acquitted. It is not relevant to discuss what was the result in respect of the other persons who were convicted. Both appellants appealed to the High Court. On 10th July 1936, the judgment of the Court was delivered by Derbyshire C. J. and Costello J. So far as concerned the charge of conspiracy, the High Court held that the conspiracy charge was not proved and in that respect reversed the decision of the Magistrate and set aside the convictions on that count. The only conspiracy charged was one single conspiracy between all the accused, consumers, organizers and tamperers. The Court held that it might well be that all the organizers and tamperers were acting in concert in such a manner as to constitute a criminal conspiracy within the meaning of S. 120-B, I. P. C. but that there was no evidence to justify the finding that all the consumers were acting in concert with all the organizers and tamperers so as to constitute the single embracing conspiracy which was charged. The charge could not be established merely because of an agreement between each consumer and the particular persons who carried out the tampering operations in concert with him and for his individual benefit. But the Court held on the construction they adopted of S. 239 (d), Criminal P. C., that the trial as a whole was not vitiated by reason of misjoinder of persons and charges. They held that there was no reason to hold that the Magistrate in framing the charges was acting with any evil motive but found that he was bona fide of opinion that the evidence given in chief by the prosecution before him at the stage of the case when he was framing the charges prima facie warranted him in charging the conspiracy as he did. However mistaken his view might turn out to have been, he was judicially exercising the discretion given him by S. 239 (d) in framing the charges as directed by S. 254. They accordingly decided that the proceedings involved no breach of the provisions of S. 239 (d) and that they were not illegal or invalid. The Court further held that the form of the charges had caused no prejudice to the accused but that the "Chief Presidency Magistrate had dealt with the evidence against each individual accused carefully and conscientiously." This conclusion of the Court had reference to the specific charges of overt acts of theft or abetting. The Court finally said :

> If we had the slightest reason to suppose that any of the convicted persons had been unfairly dealt with by reason of the whole body of them having been charged with conspiracy we should have felt it our duty to quash the proceedings. It is fortunate for the prosecution that although we have given the closest attention and consideration to the points urged by the learned advocates appearing for the appellants, we have not come to any such conclusion. The pieces of evidence which Mr. Carden Noad said would not have been admissible but for the existence of the charge of conspiracy, and also those pieces of evidence which Mr. Carden Noad declared would not be admitted in any event, none of these things have, in our opinion, had any influence adverse to the interest of the convicted persons or any of them.

This conclusion is one which their Lordships after a careful consideration of the evidence find no reason to dissent from. They also agree with the views of the High Court on the construction and effect of S. 239 (d) and on its application in the present case. Before explaining in detail their reasons for so agreeing, their Lordships observe that they will reserve for later discussion certain minor objections urged on behalf of the appellants, which have been likewise rejected by the High Court, rightly as their Lordships think. It has been taken as settled law on all sides throughout these proceedings that the infringement of S. 239 (d) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in 28 I A 257,[1] as contrasted with the result of an irregularity, as to

1. Subramania Aiyar v. King-Emperor, (1902) 25 Mad 61=28 I A 257=11 M L J 233=8 Sar 160 (P C).

which 54 I A 96[2] is an authority. Their Lordships will assume that this is so, without thinking it here necessary to discuss the precise scope of what was decided in 28 I A 257,[1] because in their understanding of S. 239 (d) that question does not arise. The Criminal Procedure Code contains a collection of statutory rules. S. 5 (1) provides that all offences under the Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to its provisions. The language of the Code is therefore conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail. Ss. 239 falls within Ch. 19, which deals with the form of charges and the joinder of charges. Under the latter division fall S. 233 to 240 inclusive. S. 233 states the general rule that for every distinct offence of which any person is accused there shall be a separate charge and each charge shall be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. Ss. 234, 235 and 236 deal with the joinder and trial of different offences against the same accused. S. 239 deals with the joinder in one charge and trial of several persons. S. 239 (d) if written out in full would read thus :

> The persons accused of different offences committed in the course of the same transaction may be charged and tried together, and the provisions contained in the former part of this Chapter (that is in regard to the form and joinder of charges) shall so far as may be, apply to all such charges.

The clause is expressly an exception from S. 233 and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly or by implication the limitation set out in S. 234 according to which not more than three offences of the same kind committed within the space of 12 months can be tried together or the limitation contained in S. 235 (1), under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in S. 239 (d). The one and only limitation there is that the accusation should be of offences "committed in the course of the same transaction." Whatever scope of connotation may be included in the words "the same transaction," it is enough for the present case to say that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. So far seems clear ; but the point of difficulty which has been strenuously argued in this appeal relates to the point of time in the proceedings at which the condition prescribed by the clause must be fulfilled. To put it more exactly, is it enough if the conspiracy is to be found in the accusation or must it be found in the eventual result of the trial? Is the relevant point of time that of the accusation, or that of the eventual result? For the former view there is an unbroken series of authorities in the Indian Courts, but the matter has not until now come before the Judicial Committee and must now be decided by them. It is a question of principle, or, perhaps more correctly, construction.

Their Lordships are of opinion that the view adopted in India is correct, as the High Court have held in the present case. The clause deals with three matters, accusation, charge, trial. It says nothing about verdict. The condition is expressed in the words "persons accused of different offences, etc." It does not say "rightly accused" or "accused and convicted." It is on the basis of what appears on the face of the accusation that the Court may proceed to charge and try. The accusation is necessarily anterior to the exercise of the discretion to charge and try. These are stages subsequent to the accusation. This view is strengthened by reference to S. 254 which states the duty of the Magistrate in warrant cases, such as the cases in question here. The duty so stated is that the Magistrate, when evidence has been taken or at any previous stage of the case if of opinion that there is ground for presuming that the accused has committed an offence triable under Ch. 21, which he is compe-

2. Abdul Rahman v. Emperor, (1927) 14 A I R P C 44=100 I C 227=54 I A 96=28 Cr L J 259=5 Rang 53 (P C).

tent to try and which in his opinion could be adequately punished by him, should frame in writing a charge against the accused. Similarly in the case of trials in the High Court or Courts of Session charges will be framed on the accusation. It is true that the opinion of the Magistrate may be wrong in law as to there being a same transaction, or the evidence which led him to think prima facie that this condition existed, may be insufficient or may eventually be falsified. It would result in any such events that the prosecution is enabled at the trial to join separate offences contrary to the terms of Ss. 234 and 235. And it has been affirmed that improper advantage is taken of S. 239 (d) so as to bring into one proceeding a great number of accused and a great multiplicity of offences, with serious hardship and injustice to the accused.

If that were indeed the result of the section, as the High Court seem to be apprehensive it might be, it would be much to be regretted and might well be a ground for an amendment of the section by the Legislature, if such practice prevailed notwithstanding the warning of the High Court and their determination to see that accused are not being unfairly dealt with and to prevent any procedure by which cases which should be comparatively short and simple become unwieldily complicated and lengthy. But even so that can be no ground why the Court should misconstrue the section. Indeed it is difficult to think that such apprehensions are justified. It must be hoped, and indeed assumed, that Magistrates will exercise their discretion fairly and honestly. Such is the implied condition of the exercise of every discretionary power. If they do not, or if they go wrong in fact or in law, then the accused has prima facie a right of recourse to the Superior Courts by way of appeal or revision. The passage already quoted from the judgment of the High Court shows how vigilant and resolute that Court would be to see that the accused were not prejudiced or embarrassed by an improper joinder of charges or of persons accused. These safeguards may well have appeared to the Legislature to be sufficient. It may seem paradoxical that the prosecution should have the advantage of joining different offences and different accused simply because the allegation of a conspiracy seemed to the Magistrate to be prima facie justified, whereas at the trial the allegation breaks down. But the charges have to be framed for better or worse, at an early stage of the proceedings. It would be paradoxical if no one could tell till the end of the trial whether the trial was legal or illegal.

Their Lordships decide the question on what they regard as the plain meaning of the language used. In doing so they are in agreement not merely with the careful judgment of the High Court in the present cases, but with the various authorities which are so fully quoted in that judgment that it is not necessary here to quote them again. Mr. Carden Noad has however contended that at least in the majority of the cases cited, the conspiracy was established in the result of the trial so that the charge was justified by the eventual verdict and it was immaterial whether accusation or verdict were taken as the crucial stage. That is true in some of the cases, but does not affect the construction of the section, which in one of the earliest, 30 Bom 49[3] in 1905, was clearly and correctly explained in the following words of Batty J. at page 54 :

> Section 239 admits of the joint trial when more persons than one are accused of different offences committed in the same transaction It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction.

To refer to only one later case, 53 Bom 344[4] the charge of conspiracy failed, but the convictions for specific acts were upheld. Baker J. at page 351 said :

> So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established, would not vitiate the trial as regards those acts for which the evidence was sufficient for proof.

Mr. Carden Noad further cited certain cases which he said supported his construction of S. 239 (d) because in these cases convictions were set aside as not satisfying the requirements of the Code as to joinder of persons and offences, though, as he contends, the Courts might have acted upon S. 239 (d). It is not necessary to refer to these cases in detail, because they seem to be essentially distinguishable in that no conspiracy or joint transaction was charged. To take one instance in 29

3. Emperor v. Datto, (1905) 30 Bom 49=2 Cr L J 573=7 Bom L R 633.
4. Gopal Raghunath v. Emperor, (1929) 16 A I R Bom 128=116 I C 243=30 Cr L J 588=53 Bom 344=31 Bom L R 149.

Cal 385,[5] a boy was charged and convicted of placing clods on a railway line and two other boys at the same trial were charged and convicted of rescuing him from legal custody. The convictions were quashed because the three offences were not charged as committed in the same transaction and the placing of the clods and the rescue were on their face separate offences In their Lordships' judgment the appeals fail in so far as they are based upon S. 239 (d). This is the ground on which it seems that special leave to appeal was granted. But in any case the further grounds argued on behalf of the appellants are not such as in their Lordships' opinion justify in a criminal matter recourse to the jurisdiction of the Judicial Committee. The nature of such grounds have often been stated. In 54 I A 96[2] it was contended that inasmuch as special leave to appeal had been granted the ordinary rules limiting the exercise of this jurisdiction ceased to apply. The Judicial Committee rejected that contention, following 41 I A 149,[6] where the language in (1887) 12 A C 459[7] was adopted and repeated :

> The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

In other words the Judicial Committee is not a Court of Criminal Appeal. But as the further objections raised by the appellants have been argued, their Lordships will shortly deal with them. It was argued that the specific offence was wrongly charged under S. 39, Electricity Act, and could only legally be charged under S. 44 (c) of the Act, which makes it an offence (inter alia) wilfully or fraudulently to alter the index of a meter or prevent a meter from duly registering. No doubt a charge could have been preferred under that section, if the condition of the jurisdiction of the Magistrate that an order should be made by the Local Government consenting to the initiation of the proceedings (S. 196. A, Criminal P. C.), had been satisfied, as in fact it was not. But the existence of S. 44 (c) does not prevent the charge which was made under S. 39 from being properly made. S 39 is in fact the major offence. That offence was clearly established, because the user of electric current without the intention of paying is beyond question a dishonest user. That is all that is required under S. 39 which creates a statutory theft sufficiently established against whoever dishonestly abstracts, consumes or uses the energy. The technical rules applicable to proving the theft of a chattel do not apply to proof of this special offence.

Then it was contended that the charge of theft was not properly framed because it alleged a multiplicity of offences between April 1934 and 16th January 1935, whereas the offences did not constitute a single continuing offence ; they were separate offences committed on particular dates and should have been separately charged. Their Lordships feel that the form of the charge was most irregular and regrettable and one which should be avoided. But they cannot regard this objection as one which in the circumstances of this case should receive effect, especially because they agree with the High Court that no injustice was inflicted on the appellants. The specific offences of which they were accused were satisfactorily proved by competent evidence, corroborated in all necessary respects. There was no miscarriage of justice. In addition the irregularity was such as could be, and was cured under Ss. 225 and 537 by the finding that the accused had not been prejudiced. A minor point that the charge of theft was bad as not alleging that the thefts were committed in pursuance of the conspiracy and therefore not alleging a same transaction, is without substance. The specific charge was clearly to be read with the conspiracy charge. In the result their Lordships are of opinion that the points taken on the appeals on behalf of the appellants fail, and that the judgment of the High Court was right and should be affirmed. Both appeals should be dismissed. They will humbly so advise His Majesty.

K.S./R.K. *Appeals dismissed.*

Solicitors for Appellant — *A. J. Hunter & Co.*

Solicitor for Respondent — *Solicitor, India Office.*

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5. Gobind Koeri v. Emperor, (1902) 29 Cal 385 =6 C W N 468.
6. Arnold v. Emperor, (1914) 1 A I R P C 116= 23 I C 661=41 I A 149=41 Cal 1023=15 Cr L J 309.
7. Dillet In re, (1887) 12 A C 459=56 L T 615= 36 W R 81=16 Cox C C 241.

A. I. R. 1938 Privy Council 136
(*From New Zealand*)
14th February 1938.

LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SIDNEY ROWLATT AND SIR GEORGE RANKIN.

Charles Francis Martin de Bueger — Appellant.

v.

J. Ballantyne & Co. Ltd. — Respondents.

Privy Council Appeal No. 30 of 1937.

Contract — Construction — Agreement entered into by two parties in London—One of them to be employed by other in New Zealand on remuneration of seven hundred pounds sterling per year—Question arising as to whether payment was to be made according to English or New Zealand currency — Held that word 'sterling' was to be construed as signifying English currency in contrast with currencies of other countries.

An agreement was entered into between the respondents and the appellant in London, under which the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter at a remuneration of seven hundred pounds sterling a year. A question arose as to whether the appellant was entitled under that agreement to be paid according to the English or the New Zealand value of the pound:

Held that the question was purely one of construction of the particular contract. The word 'sterling' was to be construed as signifying English currency, in contrast with the currencies of other countries, and in particular with that of Australia or New Zealand. The word was an express term intended to exclude and in fact excluding, the prima facie rule, according to which New Zealand pound would be meant as being currency of the place of payment. The insertion of the word 'sterling' was not a common form in a service agreement like the one under consideration. If it was used in a business document in London it naturally meant 'British sterling' and nothing else : *Case law discussed.*

[P 138 C 1]

J. D. Casswell and G. Lloyd — *for Appellant.*

Alexander Ross and Paul Tyrie — *for Respondents.*

Lord Wright.—This appeal raises a short but interesting question of the construction of an agreement about which the decisions in the Courts of New Zealand have exhibited differences of opinion. The agreement was made in London on 2nd August 1932, between the respondents, described as "a company incorporated in New Zealand, whose London Office is at 117, Wool Exchange, Basinghall Street, in the City of London," and the appellant, described as "Charles Francis Martin de Bueger, of 139, Albany Street, Regents Park, in the County of London." Under the agreement, the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter for a period of three years from his arrival at a remuneration of seven hundred pounds sterling a year. The sole question is whether the appellant is entitled under that agreement to be paid according to the English or the New Zealand value of the pound. At the date of the agreement the latter was at about 10 per cent. discount as compared with the former, later during the period of the service the discrepancy rose to 24 or 25 per cent. A special case was submitted to the Court. It states that the appellant had always consistently claimed to be paid the agreed salary "in such sums of New Zealand currency as should be the equivalent at the time of each payment of the same amount in sterling" and that the respondents had refused to pay the £700 otherwise than in New Zealand currency. The case stated three questions for the opinion of the Court, of which the answer to the first is decisive of the dispute. It is :

(1) Was the plaintiff (appellant) entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the time of each payment ?

No point is raised on the phrasing of this question which might seem to suggest the answer. Question 2 is whether, if the appellant is right in his claim, the deficiency on each periodical payment carries interest. This is not now disputed. Question 3 is whether the payments actually made in New Zealand currency of £700 were a full discharge of the agreed salary. The answer to that question obviously must follow the answer which is given to the first question.

Northcroft J. in the Supreme Court decided in favour of the appellant. He held in effect that the question was purely one of construction of this particular contract. The use of the word "sterling" could not, in his opinion, be regarded as a mere habit of speech not meaning anything more than legal tender. In this contract he thought the word must be construed as signifying English currency in contrast with currency of other countries, and in particular with that of Australia or New Zealand. He referred to recent cases in which this contrast between sterling and

other currency was plainly recognized. In the Court of Appeal that decision was reversed by a majority. Reed Ag. C. J., who dissented, held that in the absence of the word "sterling" the salary would have been payable in New Zealand currency because it was the currency of the place of performance. But the use of the word "sterling," which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express "the intentions of the parties as to the currency in which the remuneration should be paid". He held that "sterling" here meant British currency and was in constant use in that sense. Ostler J. as also Kennedy J., with whose judgment Blair J. agreed, took the opposite view. Ostler J. held that as in August 1932 the New Zealand pound was only at a discount of 10 per cent. and was not depreciated to 25 per cent. until January 1933, the appellant was not likely to have exchange questions in his mind and if he had, should have insisted on less ambiguous language than the word "sterling," which he said was used both in England and New Zealand as meaning the currency which has now taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed, from (1934) A C 122,[1] that the English and New Zealand pound were the same and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word "sterling", at least until the Reserve Bank of New Zealand Act 1933, meant nothing more than proper money which had taken the place since August 1914 of the sovereign as legal tender. Kennedy J. also emphasizes as the ground of his decision that

> the English pound or the pound sterling, as the unit of account, is not only identical with the English pound used in England for so many years, but it is also one and the same as the New Zealand pound.

"The pound in New Zealand is," he held, "the same unit of account as the pound in England, not merely a unit of account with the same name"; hence he concludes:

> The obligation to be discharged by payment in New Zealand is expressed in a money of account common to New Zealand and to England and will be discharged by tender of that which is legal tender at the place of performance.

Thus in his judgment the word "sterling" adds nothing. "It merely," he adds, "emphasizes what is already clear, that the money of account is English." He seems to use interchangeably unit of account and money of account, though the former should refer to a denomination and the latter to a currency.

Their Lordships, with the greatest respect, find themselves unable to agree with the majority of the Court of Appeal. It is important to realize what (1934) A C 122[1] actually decided. The decision was that a sum in "pounds" payable under a contract made in England but payable in Australia was payable not in sterling but in Australian currency. The difference in money value was very substantial, so that to a practical mind it would seem wrong to say that the English pound and the Australian pound were the same. They were only identical in name and as a matter of words, though up to 1914 they had been the same both in name and in fact, both being linked to gold and based on the same gold coin, the sovereign. This identity in words combined with practical difference in value was expressed by Lord Warrington of Clyffe in (1934) A C 122[1] at p. 138, where he said:

> I have come to the conclusion that merely as a unit of account, the pound symbolized by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged.

It was just this difference in the "means" of discharging the obligation, that is, the actual currency, which was the essence of the case. This practical difference was again emphasized in (1936) A C 497,[2] where an Australian taxpayer was objecting to convert income received in English sterling and left in England into Australian currency when making his tax returns. The figure of income, if so converted, was substantially higher than it would have been if he could have brought in his sterling income at its face amount. It was held that he was bound to convert the English pounds into Australian pounds. The name of the measure of the obligation might be identical, but the measure of the value connoted or of the means of discharging it, was different. It is clear that under a

1. Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd., (1934) A C 122=103 L J Ch 85=150 L T 281=39 Com Cas 119=77 S J 913=50 T L R 147.

2. Payne v. Deputy Federal Commissioner of Taxation, (1936) A C 497.

contract like that in question what matters to the parties is the means (that is, the currency) in which the obligation is to be discharged. In their Lordships' judgment the word "sterling" was added in the agreement in order to define what means of discharge, that is, what currency was being stipulated. The necessity for adding the word was simply because the "unit of account" the word "pound" or symbol £, is the same both in England and in New Zealand. If the word "sterling" had not been inserted the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in (1934) A C 122.[1] The effect of that decision was recently summarized by this Board in (1937) A C 587[3] at p. 604 :

> It is quite clear that the whole problem [in that case] arose because of the divergence in value of the two currencies, and it was solved as a question of construction by determining what currency in the true construction of the contract, was connoted by the use of the word 'pound'. It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency.

In the agreement here in question, the word "sterling" in their Lordships' judgment is an express term intended to exclude and in fact excluding, the prima facie rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. It is impossible in their judgment to regard the word as indicating simply legal tender at the place of payment, New Zealand. The agreement is clearly on its face a formal and studied document. It is drawn up and executed in London between the respondents' London house and the appellant, a London resident. The insertion of the word "sterling" is not common form in a service agreement like this. If it is used in any business document in London it naturally means "British sterling" and nothing else. It is used in this sense habitually in exchange quotations and in documents dealing with international transactions, in which it is necessary to define the currency intended, including transactions with the Dominions. The contrast between sterling (sc., British sterling or currency) and Dominion or Colonial currency is familiar. The contrasted use of these terms is to be found in seventeenth and eighteenth century authorities, of which some are cited in (1934) A C 122[1] at p. 153. The contrast between sterling and other currency is also illustrated in the (1932) 43 Ll L Rep 378,[4] where the charterparty distinguished between British sterling and Australian currency, and also *passim* in recent judgments in this country such as (1934) A C 122[1] and (1937) A C 587[3] (supra). Having regard to the place where, and the parties between whom, this contract was made, their Lordships are satisfied that the appellant's claim is well founded. It is not to be forgotten that in August 1932 exchange questions were matters of business moment. The appellant who was going to New Zealand might naturally desire to be assured that he would be paid in the currency with which he was familiar.

Their Lordships do not desire to express any opinion on the question whether the construction of the agreement would have been the same if it had been made and entered into in New Zealand. On this question eminent Judges in New Zealand seem to differ and their Lordships need not decide it on this occasion. But it would not, in their Lordships' judgment, be right to attribute to the appellant, or indeed to the respondents' London house, or to those who drafted the agreement, any familiarity with the law and practice of New Zealand in matters of currency, or any intention to import that law or practice, whatever it might be, into the agreement, which was obviously drafted with the idea of eliminating any doubt or dispute that the appellant would be paid the same amount of salary as if he were working in England. For these reasons, their Lordships are of opinion that the appeal should be allowed and the judgment of Northcroft J. restored. If the parties are unable to agree on the sum to which the appellant is entitled, there must be an order for a reference to the Supreme Court to fix it. The appellant will have his costs of this appeal and his costs in the Courts below. Their Lordships will humbly so advise His Majesty.

R.M./R.K. *Appeal allowed.*

Solicitors for Appellant—*Lloyd & Lloyd.*

Solicitors for Respondents — *Wray, Smith & Halford.*

3. Auckland Corporation v. Alliance Assurance Co. Ltd., (1937) 24 A I R P C 54=167 I C 337=(1937) A C 587.

4. Westralian Farmers Ltd. v. King Line Ltd., (1932) 43 Ll L Rep 378=48 T L R 598.

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(From Madras)

10th February 1938

LORDS RUSSELL OF KILLOWEN, ALNESS AND ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Raja Bahadur Dhanarajagerji — Appellant.

v.

Raja Panuganti Parthasarathi Rayanim Varu and others — Respondents.

Privy Council Appeal No. 13 of 1936.

(a) Mesne profits—Suit for redemption — Trial Judge decreeing suit, allowing certain amount as mesne profits for only 1914, first year for which mesne profits were payable under mortgage—Privy Council while restoring trial Judge's order varying it by allowing mesne profits from 1914 to date of delivery of possession—Held that in arriving at mesne profits for the whole period amount specified for 1914 should not be accepted—Counter interest held was payable on amount of interest that was payable by plaintiff on mortgage money from date it was due to date it was actually paid.

In a suit for redemption of a mortgage, which stipulated that if the mortgage money was paid at the latest before 31st August 1914 the defendant should refund all rents and profits as from 1st July 1914, the trial Judge while decreeing the suit, ordered that if the plaintiff paid into Court the mortgage money before 5th March 1919 the defendant should reconvey the property and pay Rupees 60,000 on account of past mesne profits for 1914, but awarded no mesne profits for any year after that. The money was duly deposited in the Court on 5th March 1919. The defendant appealed to the High Court but not being satisfied with its order appealed to the Privy Council. The Board restored the decree of the trial Judge with the following variation that the plaintiff was chargeable with interest at 6 per cent. per annum from 1st September 1914, down to the date when the amount was paid into Court. On the other hand the defendant must account to the plaintiff for mesne profits of the properties from 1st July 1914 until actual delivery of possession. The delivery of possession was given in December 1924. In taking accounts the dispute arose whether for the first year 1914 the figure arrived at by the trial Judge was to be accepted or a fresh account taken, as in the case of other years :

Held (1) that the year 1914 could not be excluded from the account and the mesne profits for that year must be computed afresh. The defendant would get credit for the amount already paid by him. [P 141 C 2 ; P 142 C 1]

(2) That the Order in Council could not be read as directing the defendant to account for gross receipt from 1st July 1914 to the date of delivery of possession. The decree of the trial Judge, which was restored with variation and the Order in Council itself must be taken to intend the meaning given to the phrase 'mesne profits' by Cl. 12 of S. 2, Civil P. C. [P 142 C 1]

(3) That it was only right as a matter of proper accounting that counter interest should be charged against the plaintiff on the amount of interest with which he was chargeable from 1st September 1914 to date of delivery. [P 141 C 2 ; P 142 C 2]

(b) Mesne profits—High Court in calculating mesne profits for a period, relying upon average of two years as best basis of computation—Material available difficult— Conclusion reasonable and convincing—Privy Council held could not interfere with such figure—High Court in interest of mortgagee asking him to produce figures for deduction of costs of collection—Fact that result was unfavourable to mortgagee, held no ground for varying cost of collection by Board.

The High Court in calculating the mesne profits for certain period, obtained reliable figures representing the gross demand attributable to the suit lands for two years and took the average of these as being in their judgment the best basis of computation afforded. The material available was difficult and the conclusion arrived at after close scrutiny was reasonable and convincing. In considering deduction for collection charges, it was thought, it was in the interest of the defendant to establish specific figures showing the costs of collection :

Held that the Judicial Committee of the Privy Council would not interfere with such figures, though they could be criticized in detail. [P 142 C 1, 2]

Held also that if the result of this endeavour in showing collection cost was unfavourable to the defendant, the Board would not be right in varying the order on that account. [P 142 C 2]

L. P. E. Pugh, C. Sidney Smith and A. S. Krishna Rau Pantulu Garu— *for Appellant.*

Sir Herbert Cunliffe and P. V. Subba Row — *for Respondents.*

Sir George Rankin.—In this case three appeals have been consolidated. They arise out of an account taken in the Court of the Subordinate Judge of Nellore under an Order of His Majesty in Council dated 25th June 1924, decreeing a suit for redemption of a mortgage. The suit had been brought in that Court on 27th August 1915, by three persons who had acquired the rights of the mortgagor, the then Raja of Kalahasti, in the suit lands under an execution sale in February 1915. One of them has since died but they may be referred to collectively as "the plaintiffs". The person sued as mortgagee was the first defendant and the Raja of Kalahasti was the second. As the latter was only a formal party and took no part in contesting the suit, defendant 1, though now dead and represented by his son, will be referred to herein as the defendant. Execution proceedings under the Order in Council were begun by Execution Petition No. 63 of 1924 filed on 1st October 1924, in the

Court of the Subordinate Judge, and on 22nd December of that year, a commissioner was appointed to ascertain the mesne profits. He reported on 14th March 1929, and the Subordinate Judge gave his decision on 26th August 1929. Both sides appealed to the High Court, the defendant's appeal being No. 362 of 1929 and the plaintiff's appeal, No. 161 of 1930. The High Court dismissed the plaintiffs' appeal, and the defendant's appeal was successful only in part. Hence the defendant has brought one appeal to His Majesty (C. M. P. No. 1717 of 1933) and the plaintiffs have brought two (C. M. P. No. 3685 of 1933 and C. M. P. No. 2984 of 1933).

The transaction giving rise to the litigation is represented by two instruments dated 4th August 1908. One was a conveyance by which the then Raja of Kalahasti conveyed certain lands to the defendant for the sum of six lakhs; by the other the defendant agreed to sell the said lands back to his vendor for six lakhs on condition that this sum was paid on 31st August in the years 1912, 1913 or 1914. It was stipulated that if the six lakhs were not paid before 31st August 1914, the agreement for re-purchase should not be operative, but that if it was paid on 31st August 1914, the defendant should refund all rents and profits as from 1st July 1914.

The plaintiffs maintained that the transaction of 4th August 1908, was a mortgage in the form of a conditional sale, and that the six lakhs had in conformity with the contract been duly tendered to the defendant, who had refused to reconvey. They claimed accordingly a decree for redemption, and they asked inter alia to recover Rs. 80,000 for mesne profits for the Fasli year 1324, that is from 1st July 1914, to 30th June 1915, together with future mesne profits to the date of delivery of possession. The case of the defendant was that the transaction was not a mortgage and that tender of the purchase money under the contract for re-purchase had not been made timeously or in accordance with the terms agreed upon.

At the trial the learned Subordinate Judge found for the plaintiffs, holding that the transaction of 1908 was a mortgage. He made a preliminary decree for redemption to the effect that if the plaintiffs paid into Court six lakhs before 5th March 1919, the defendant should re-convey the property and should pay Rs. 60,000 on account of past mesne profits for Fasli 1324, together with certain costs. This decree was dated 5th October 1918. He refused to award mesne profits to the plaintiffs for any year after Fasli 1324, giving as his reason that though the six lakhs had been tendered in 1914, the plaintiffs had not deposited that sum in Court. He arrived at the figure Rs. 60,000 upon what he described as vague oral evidence, no accounts having been filed before him. Though he described the materials as crude, he said that "on the whole, I think it safe to fix the mesne profits for Fasli 1324 at Rs. 60,000". The sum of six lakhs was brought into Court on 5th March 1919 and a final decree for redemption was passed on 7th October 1919.

The defendant appealed from both decrees to the High Court at Madras whose decree is dated 24th February 1921. The High Court found in his favour that the transaction of 4th August 1908 was not a mortgage, but held against him that the conditions entitling the plaintiffs to re-purchase had been fulfilled, and that he must reconvey the property. Although the question of the amount of mesne profits does not appear to have been discussed in the judgment, the decree of the High Court adopted the figure of Rs. 60,000 (applied by the Subordinate Judge to the first year from 1st July 1914), and applied it to the whole period from that date until delivery of possession by the defendant. It also directed that the plaintiffs should pay interest on the six lakhs at 6 per cent. per annum from 1st September 1914, to the date of deposit.

The plaintiffs do not appear to have been minded to contest the matter further, but the defendant appealed to His Majesty, contending that the plaintiffs had not fulfilled the conditions which entitled them to re-purchase the land, and also that the right of re-conveyance was personal to the Raja of Kalahasti, and did not pass to any assignee. On 19th June 1924,* judgment was delivered by Lord Blanesburgh on behalf of the Board. From this judgment it appears that the sole question ultimately argued on the defendant's behalf was the question whether the transaction was or was not a mortgage. The opinion of the Board was to the effect that

a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

*Since reported in (1924) 11 A I R P C 226.

On this point they agreed with the conclusion of the Subordinate Judge and disagreed with the High Court. Their advice to His Majesty was expressed as follows :

> The respondents in their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from 1st September 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.
>
> On the other hand, the appellant must account to the respondents for mesne profits of the properties as from 1st July 1914, until actual delivery of possession to the respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion, be restored.

The terms of the Order in Council ran as follows :

> Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that the decree of the High Court of Judicature at Madras, dated 24th February 1921, ought to be discharged and that with the following variations the decrees of the Court of the Subordinate Judge of Nellore, dated 5th October 1918, and 7th October 1919, ought to be restored ; (2) that it ought to be declared that the respondents are chargeable with interest upon the mortgage money advanced at the rate of 6 per cent. per annum from 1st September 1914, to 5th March 1919, upon which date the said mortgage money was paid into Court ; (3) that it ought to be further declared that the appellant is entitled to the interest earned by the said mortgage money since it was so paid into Court ; (4) that the appellant ought to account to the respondents for the mesne profits of the property as from 1st July 1914, until the actual delivery of possession to the respondents ; and (5) that there ought to be paid by the appellant to the respondents their costs of the appeals to the said High Court, their costs of this appeal incurred in the said High Court and the sum of £561 17s. 6d. for their costs thereof incurred in England.

It has already been explained that the disputes now before the Board arise out of the accounts which have been taken under this Order. Delivery of possession was given by the defendant to the plaintiffs in December 1924, and the computation of mesne profits is now the main subject of dispute. The first question is whether, for the first year from 1st July 1914 (Fasli 1324), the figure of Rs. 60,000 arrived at by the trial Judge is to be accepted, or whether the Order in Council requires that a fresh account should be taken to ascertain the mesne profits for the first year, no less than for the other years up to the date of delivery of possession. For the defendant it is contended not only that the figure of Rs. 60,000 should be accepted for the first year, but that it should likewise, on the strength of the High Court's decree be accepted for six years thereafter. This last mentioned contention must, in their Lordships' view be rejected, notwithstanding that the Board's judgment does not refer expressly to the matter, since the decree of the High Court was set aside. The question as to the first year however presents some difficulty. By the Order in Council, the decree of the Subordinate Judge is restored with the following variation

> that the appellant ought to account to the respondents for the mesne profits of the property as from 1st July 1914, until the actual delivery of possession to the respondents.

This must prima facie be read as directing the account to begin as from 1st July 1914. It is said however that this meaning should give way to the consideration that their Lordships cannot, without difficulty, be supposed to have overruled the trial Judge on the question of the first year's profits without mentioning the matter specifically. While there is no little force in this contention, it may also be considered that if it had been intended that the accounts for the first year should not be gone into, mention of 1st July 1914, would not have been made, unless accompanied by a statement to the effect that the accounts for the first year already taken were not to be disturbed. Moreover, it is not clear that the finding of the trial Judge amounted, in the strict sense, to the taking of an account. The weight to be given to such considerations must depend on all the circumstances of the case, as well as on the exact language of the ordering portions of the decree of the Subordinate Judge and of the Order in Council. Their Lordships have, on this point, reached the conclusion that the contention of the plaintiffs must be accepted, that the first year (Fasli 1324) cannot be excluded from the account and that the mesne profits for that year must be computed afresh. It will not however be necessary to require the High Court to pursue any further investigation of the accounts in order to include the year 1324, learned counsel on both sides having agreed before their Lordships to accept for that year the average of the first nine figures in column 10 of the account contained in the High Court's judgment. This figure, with interest thereon, to 26th August 1929 (the date of the order of the Subordinate Judge upon the accounts), as in the case of the other years, must be added. The defendant will however get credit for

Rs. 60,000, the sum paid by him in respect of Fasli 1324, with counter interest from the date of payment or satisfaction (11th August 1920), as in the case of similar items already included in the account.

The plaintiffs further contend that, having established that the transaction was a mortgage and that the mortgagee did not re-convey notwithstanding the tender of the mortgage money, they are entitled under Cl. (i) of S. 76, T. P. Act, as it stood in 1914, to require the defendant to account for the gross receipts from the property from 1st July 1914, until the day in December 1924, when he made over possession to the plaintiffs. This contention was first raised six months after the date of the Order in Council by an application in execution (No. 22 of 1925) filed on 18th January 1925. Without discussing the question whether, had this relief been asked for by the plaint, it could have been refused, their Lordships are of opinion that the High Court were clearly right in taking the view that the Order in Council directing the defendant to account for the mesne profits of the property cannot be read as requiring him to account for the gross receipt. The decree of the Subordinate Judge, which is restored with variation, and the Order in Council itself must be taken to intend the meaning given to the phrase "mesne profits" by Cl. 12 of S. 2, Civil P. C. This contention of the plaintiffs which is the basis of their appeal, C. M. P. 2894 of 1933, must therefore be rejected.

Their Lordships are not of opinion that the plaintiffs can succeed upon any of the remaining contentions raised by them. Both sides have sought to induce the Board to interfere with the figures arrived at by the High Court as representing the mesne profits of the years between 1325 and 1333; but their Lordships are unable to discover any question of principle or of law upon which the High Court have gone wrong. With great care the learned Judges have arrived upon difficult material at a conclusion which appears to be reasonable and convincing. They found it possible to obtain reliable figures representing the gross demand attributable to the suit lands for the Fasli years 1334 and 1335, and they have taken the average of these two years as being, in their judgment, the best basis of computation afforded by the evidence. They have arrived after close scrutiny of detail at a reasonable figure in respect of deductions to be made for each year under different heads. Such figures can always be criticized in detail but no case has been made out calling for revision of these figures by the Board.

The plaintiffs having alleged that the defendant had acted fraudulently and improperly in letting lands to tenants, the High Court has permitted independent proceedings in execution to continue as to this claim; and their Lordships are unable to discover that the plaintiffs have any grievance either as to this matter, or as to the refusal of the High Court to entertain claims for further mesne profits in respect of premiums received from new tenants. The defendant has objected that he should have been allowed a deduction of ten per cent. for collection charges, independently of his establishing this figure by evidence, [62 I A 53[1]], but it appears that it was thought to be to his interest in the Courts below to establish specific figures showing the cost of collection. This indeed was the form given to his contention in his case on this appeal. If the result of this endeavour has been somewhat unfavourable to him, their Lordships do not think it right that the High Court's order should be varied on that account. His contention that interest should not have been allowed upon mesne profits is clearly answered by the definition in the Code, S. 2 (12).

There remains however one matter upon which the defendant must succeed. The Order in Council (in agreement with the High Court's decree) finally determined that the plaintiffs were chargeable with interest at six per cent. per annum from 1st September 1914, to 5th March 1919, the date upon which the six lakhs were paid into Court. This interest amounted to Rs. 1,62,400 as on 5th March 1919. In their Lordships' view it is only right as a matter of proper accounting, that counter interest should be charged against the plaintiffs on this sum if, on the other side of the account, they are to be credited with interest upon the whole of their claim from 1914 onwards. There is no distinction between this item and the items for which the plaintiffs admit that counter interest must be computed, by reason of payments received by them on account of

1. Secretary of State v. Saroj Kumar Acharjya, (1935) 22 A I R P C 49=154 I C 1=62 I A 53 =62 Cal 499 (P C).

their claim. If the two sides of the account are to be made out separately, and a balance struck only at the end, it is necessary that each side should be comparable with the other. The account in this case runs from 1914 to 1929. The learned Judges of the High Court seem to have misunderstood the defendant's contention on this point. The Order in Council directed that the six lakhs should carry interest for a given period. It was not necessary that it should direct how this credit should be treated in account. This however is the only point on which, in their Lordships' view, the defendant's appeal can be accepted.

Their Lordships will humbly advise His Majesty that the appeal of the defendant should be allowed in part and that he should have credit in account for counter interest at six per cent. per annum on the sum of Rs. 1,62,400, from 3rd March 1919, to 26th August 1929. Also that of the plaintiffs' appeals C. M. P. 2894 of 1933 should be dismissed and C. M. P. 3685 of 1933 should be allowed in part; and that in respect of the Fasli year 1324, mesne profits should be computed, based upon the average of the nine years, 1325 to 1333, as set forth in column 10 of the account above mentioned, together with interest to 26th August 1929; proper credit being given for what the plaintiffs had received in respect of Fasli 1324. The sum of Rs. 6,23,665-1-0 in Cls. 1 and 2 of the order of the High Court should be adjusted accordingly but save as aforesaid the order of the High Court should stand including its provisions as to costs. There will be no order as to the costs of this consolidated appeal.

V.B.B./R.K. *Order accordingly.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
Harold Shepherd.

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(From Ontario)

4th February 1938

LORDS ATKIN, THANKERTON, RUSSELL OF KILLOWEN, WRIGHT AND MAUGHAM.

Canadian Shredded Wheat Co. Ltd. — *Plaintiffs* — Appellants.

v.

Kellogg Company of Canada Ltd. and another — *Defendants* — Respondents.

Privy Council Appeal No. 40 of 1937.

(a) Trade Mark — Registration — Words merely descriptive of patented product cannot be registered as trade mark—Descriptive words may however have acquired secondary meaning indicative of origin — Where words in addition to their being descriptive of goods are also the name of product of which those goods are composed and are also in common use, it is difficult to conceive that they could acquire secondary meaning.

Where a name is merely descriptive of the patented product or of the character and quality of the goods in connexion with which it is used, the name, after the patent has expired, cannot be registered as a trade mark because it would be attempting by registering the name of the patented product to prolong the patent monopoly. It is however clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or indicate that the goods in connexion with which it is used are the goods of a particular manufacturer, in other words that the word in question has in its secondary meaning become indicative of origin. But the onus on the person who attempts to establish this secondary meaning is a heavy one. If in addition to being descriptive of the goods in connexion with which it is used, it is in fact the name of the product of which those goods are composed, then a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin so as to render it capable of registration as a trade mark. The difficulty may sometimes be overcome in a case where the alleged trade mark is in fact a description of the goods, but is not recognized by the trade or the public as being such, and is taken by them as being a fancy name, e. g., where a chemical description not generally known to the public has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning. In order to ascertain whether words have acquired secondary meaning it is of primary importance to see how the manufacturer used the words, i. e. to see whether he used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or whether they were used by him merely descriptively. [P 146 C 2; P 147 C 1, 2]

(b) Trade Mark — Passing off — Expiry of patent — Rival manufacturer manufacturing goods similar in appearance as patented goods and adopting to them descriptive name by which patented goods had been known—Manufacturer is not guilty of passing off.

It is difficult where a name is descriptive of patented product to conceive that a manufacturer could be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that in the case of a patent, long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manu-

facturer. But difficult as such a case is to prove in the case of a descriptive word, it must be additionally difficult in the case where a word is the name of goods as well as being descriptive of those goods. (P 152 C 1]

Sir Stafford Cripps, W. N. Tilley (Canadian Bar), R. C. H. Cassells (Canadian Bar) and G. H. Tookey — *for Appellants.*

Russell S. Smart (Canadian Bar) and Christopher Robinson (Canadian Bar) — *for Respondents.*

Lord Russell of Killowen. — In this case the Canadian Shredded Wheat Co., Ltd. (hereinafter referred to as the plaintiff) sued two defendants in the Supreme Court of Ontario, claiming an injunction to restrain an alleged infringement of registered trade marks and passing off of goods, and damages. The trial Judge dismissed the action with costs. The plaintiff appealed to the Court of Appeal for Ontario, and the appeal was dismissed with costs. The plaintiff now appeals to His Majesty in Council. The circumstances which have given rise to this litigation are exceptional, and must be stated in some detail. On the 27th May, 1896, one Henry D. Perky obtained a grant of Canadian Letters Patent (No. 52428) covering a new product which he had invented, and a process and machine by means of which the new product was prepared or produced. According to the patent, wheat is taken in berry form and, after being thoroughly washed, is boiled for about an hour. It is then dried for some hours. The berries are then passed between compression rollers, one or both of which is or are provided with a series of fine circumferential grooves whereby the berries are mashed, and their outer bran coats, gluten layers and starchy interior portions are thoroughly incorporated together and forced into the grooves whence the resultant food is discharged by means of a comb "in light porous and tender threads or filaments into a pan or other receptacle, or upon a moving receiver whereby they may be disposed in layers." The specification then proceeds as follows :

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways.

The food presented is a purely cereal product, and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.

The article as produced is a food or bread composed of superposed or massed layers or deposits of comparatively dry externally rough, porous, sinuous threads or filaments of cooked whole wheat, containing intermixed the bran, starch and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products.

The apparatus for carrying out the process is then described, and finally the product, the process and the apparatus are severally claimed, the claim for the invented product being thus phrased :

A food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch and gluten of the entire berry and which is free from leavening or raising material or other products.

It will be seen that the invented product is the food as discharged from the rollers, which may be either collected in a receptacle, or formed into layers by means of a moving receiver, and which may be used in its then condition or may be further cooked by being baked in shapes. On the 13th August, 1901, Perky obtained a grant of Canadian Letters Patent (No. 72695) for improvements in and relating to machines for making biscuits and other articles. This patent covered the machine which was used by the plaintiff for the production of biscuit shapes, composed of the new product (the subject of Patent No. 52428) which issued from the rollers on to a travelling band. The new product was called and was known by the name of shredded wheat. Although the process covered by Patent No. 52428 may be strictly a mashing rather than a shredding process, the product in fact presents every appearance of having been shredded; and it is to be observed that the patentee in his Patent No. 72695 himself refers to the process as "shredding the grain". There can be no manner of doubt that the name shredded wheat very aptly describes the new product. The new product was first marketed in Canada in the year 1898 by a company which was registered in the United States of America, and which had its factory in that country. It continued to be imported from the United States into Canada and sold there to some extent for some six or seven years. In the year 1904 the plaintiff was incorporated under the laws of the Province of Ontario. It acquired the goodwill of the business in Canada of the company which was at that time importing the product into Canada and selling it there. It built a factory for its manufacture on the Canadian side of Niagara Falls and in 1905 commenced and

has ever since continued to manufacture the product in Canada and to sell it there. The product was sold in two forms. The one a biscuit which consisted of the shredded wheat produced by the process and apparatus protected by patent No. 52428, after it had been panned and cut for baking by the apparatus protected by patent No. 72695 and baked. The other a biscuit made of the same material cut in a flattened and compressed form, which the plaintiff sold under the name "Triscuit". The trade in Triscuits was small, but the plaintiff's trade in the other biscuit undoubtedly developed large proportions.

The Patent No. 52428 expired in the year 1914. Down to that time no one had sold or could sell the product known as shredded wheat in Canada except the plaintiff and its predecessors-in-title. In other words, for some 17 or 18 years the plaintiff and its predecessors had enjoyed the monopoly of selling the patented product in Canada. Upon the expiry of the patent anyone in Canada could make it. The patent No. 72695 expired in 1919. The plaintiff's monopoly thereunder then ceased and any manufacturer of the product in Canada could use the apparatus covered by that patent, for the purpose of panning and cutting the product for baking. Anyone would be entitled to sell in Canada the articles so produced as shredded wheat, or shredded wheat biscuits, provided that in so doing he did not (1) infringe some other person's trade mark or (2) pass off the goods as being the manufacture of some other person. In 1912 the plaintiff had registered in Canada as a trade mark "to be applied to the sale of shredded cereal biscuit," a picture of a shredded wheat biscuit in a dish or bowl, with a spoon resting in the bowl. The biscuit as depicted shows the shape, resembling somewhat a little pillow or roll, which the biscuit apparently necessarily assumed after the article, which resulted from the product having been panned and cut by the apparatus under patent No. 72695, had been baked. For some years after the expiry of the two patents the plaintiff continued in fact to enjoy its monopoly in Canada. No rival manufacturers appeared upon the scene.

In 1924 a strange event happened. The United States Company (The Natural Food Company) which had in 1904 sold the goodwill of its Canadian business to the plaintiff, had changed its name to The Shredded Wheat Co. In March 1924, it applied to have registered as its trade mark in Canada in respect of biscuits or crackers the words "Shredded Wheat", alleging (amongst other things) that from 1st January 1894, to date it had adopted and used the said trade mark by applying it to cartons containing the biscuits, that no other person had used the mark in Canada in connection with the sale of goods and that it had had a factory at Niagara Falls, Ontario, for a great number of years. Here was a pretty confusion of ideas and entities; but the words "Shredded Wheat" were in fact registered in the Trade Mark Register at Ottawa as the trade mark of the Shredded Wheat Company, to be applied to the sale of biscuits or crackers. And the words remained so registered for more than three years. The registration, however, was cancelled in September 1927. On 20th March 1928, the words "Shredded Wheat" were registered as the plaintiff's trade mark to be applied to the sale of biscuits and crackers; and on 3rd April 1929, the same words were registered as its trade mark to be applied to the sale of cereal foods cooked or prepared for consumption. In the year 1934 the Kellogg Company of Canada, Ltd., defendant 1 to the action (hereinafter called Kellogg's) began to sell in Canada biscuits made of shredded wheat. Among their customers was a retail grocer one Solomon Bassin (defendant 2 to the action) who in turn resold some of the said biscuits to his retail customers. The plaintiff immediately issued the writ in these proceedings and obtained an undertaking (without prejudice) which had the effect of stopping the alleged wrongful sales until the trial or other final disposition of the action.

The biscuits sold in Canada by the defendants were made by the same or substantially the same process as that by which the plaintiff's biscuits are made. In other words the patented processes were used and the patented product was thereby produced. The biscuit manufactured by Kellogg's, though of the same pillow or sausage roll shape, was some 25 per cent. shorter in length. It would seem from the evidence that the rounded pillow shape is the result of puffing-up in the baking of the product, after it has been panned and cut by the apparatus protected by Patent No. 72695. The length and width would be determined by the width of the stream

of the product and the spacing of the cutters. Kellogg's sold their shredded wheat biscuits in cartons, each containing 15 biscuits packed in five layers of three biscuits each, the layers being separated by a corrugated separator or pad. The carton contained on each of its four sides and also on the top and bottom the words "Kellogg's Shredded Whole Wheat Biscuit". On the top and bottom appeared the words "Made in U. S. A.". On the two broad sides appeared the words "W. K. Kellogg" and "Kellogg Company, Battle Creek, Michigan". The cartons made it plain for all the world to see that the contents of the cartons were biscuits composed of shredded wheat, manufactured by a U. S. A. company called Kellogg Company. No passing off by means of get-up of the cartons is alleged or could be alleged by the plaintiff. Indeed Kellogg's carton was in all respects quite different in get-up and appearance from the cartons in use by the plaintiff. Apart from a question of passing off by reason of the form or shape of Kellogg's biscuit, the plaintiff's claims to relief are two, and are both founded upon the use by Kellogg's of the two words shredded wheat.

In the first place the plaintiff claims an injunction to restrain the defendants from infringing the registered trade marks consisting of the words "Shredded Wheat" by the use of the words "Shredded Wheat," or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit" or any words only colourably differing therefrom. As to this claim their Lordships at this stage content themselves with observing that if the plaintiff's said trade marks are valid trade marks there can in their opinion be no doubt that the defendants by selling biscuits as shredded whole wheat biscuits do infringe those marks. If the plaintiff succeeds on the first claim, no injunction in respect of alleged passing off by the use of the words shredded wheat would be required. But in the event of the trade marks being held invalid the plaintiff asks for an injunction to restrain the defendants from (putting it shortly) by the use of the same words or any words only colourably differing therefrom, passing off Kellogg's biscuits as the plaintiff's biscuits. Their Lordships proceed to deal with these alternative claims, each of which as will be seen involves a consideration of the question of the aptness or capability of the words shredded wheat to distinguish the product or article manufactured by the plaintiff from a similar product or article manufactured by anyone else; or their aptness or capability of indicating that goods to which they are applied are the exclusive manufacture of the plaintiff.

The plaintiff's first trade mark was not registered until the year 1928, when application was made to register the words "Shredded Wheat" to be applied to the sale of biscuits and crackers. For years down to 1912 the plaintiff had been the sole manufacturer of biscuits composed of a patented product to which had been given the name shredded wheat, a name, as their Lordships think, completely descriptive of the patented product. There can be little doubt that had the plaintiff, when the patent expired, attempted to register the words "Shredded Wheat" as a trade mark for the sale of biscuits and crackers, the application would have met with short shrift. It would be attempting by registering the name of the patented product to prolong the patent monopoly: and this may not be done. Had the plaintiff during the currency of the patent applied to the product manufactured by it, a distinctive trade mark duly registered, it could have effectively secured for itself a means by which when the patent expired the shredded wheat which it manufactured would be distinguished from the shredded wheat manufactured by others, if and when anyone chose to avail himself of the right then open to the public of manufacturing shredded wheat. But this the plaintiff failed to do, except for the registration in 1912 of the bowl and spoon trade mark before referred to, and its user to the extent which hereinafter appears. The language used by Lindley L. J. in (1883) 24 Ch D 504[1] at p. 521 may properly be quoted in this connexion, viz.:

> I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired; for instance if he impressed on the patented articles a griffin or some other device; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers.

The plaintiff however claims that in the interval between the expiry of the patent in 1914 and the registration of the trade

1. In re Palmers Trade Mark, (1883) 24 Ch D 504 =50 L T 30=32 W R 306.

mark in 1928, no one else (with one possible exception) had manufactured the patented product, and that the words had in fact become distinctive of its manufacture and were properly registrable as its trade mark accordingly. The trade marks here in question were registered under the Trade Mark and Design Act (R. S. Canada 1927 c. 201). S. 5 (1) defines what, for the purposes of the Act, shall be considered and known as trade marks, in the following terms :

> 5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade-marks.

By S. 13 it is provided that after registration the proprietor "shall have the exclusive right to use the trade mark to designate articles manufactured or sold by him". By S. 11 however registration may be refused "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark properly speaking." The effect of this provision is that a word is not registrable under the Act as a trade mark which is merely descriptive of the character and quality of the goods in connexion with which it is used : (1911) A C 78[2] and (1924) S C R 600.[3] It is however clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or indicate that the goods in connexion with which it is used are the goods of a particular manufacturer; in other words that the word in question has in its secondary meaning become indicative of origin: (1910) 1 Ch 130.[4] But the onus on the person who attempts to establish this secondary meaning is a heavy one. If in addition to being descriptive of the goods in connexion with which it is used, it is in fact the name of the product of which those goods are composed, then it would seem to their Lordships that a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin, so as to render it capable of registration as a trade-mark. The difficulty may sometimes be overcome in a case where the alleged trade-mark is in fact a description of the goods, but is not recognized by the trade or the public as being such, and is taken by them as being a fancy name, e. g. where a chemical description not generally known to the public has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning. It is, however, contended that in the present case such extreme difficulty has been surmounted, and that the evidence has established the fact that the words shredded wheat have acquired a secondary meaning, and when applied to biscuits mean shredded wheat biscuits manufactured by the plaintiff and by no one else. Their Lordships therefore proceed to consider the evidence, calling attention, however, to the fact that the oral evidence was in point of time not specifically directed to the date when the trade mark was registered, but referred to the time at which each particular witness was speaking and was therefore more strictly relevant to the general question of passing off.

In the first place it is of primary importance to see how the plaintiff used the words shredded wheat, i. e. to see whether the plaintiff used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or whether they were used by the plaintiff merely descriptively. It was said in argument that the way in which the plaintiff used the words was irrelevant. Their Lordships do not agree with this contention. In endeavouring to ascertain what it is that indicates who is the manufacturer of goods great weight must necessarily be attached to the steps which the manufacturer takes to indicate origin. Indeed the foundation of the relief granted in the well known case of (1896) A C 199,[5] to which further reference must be made hereafter, was that the words there in question had been used by the plaintiff as a trade mark. There

2. Standard Ideal Co. v. Standard Sanitary Manufacturing Co., (1911) A C 78=80 L J P C 87=103 L T 140=27 R P C 789=27 T L R 63.
3. Channell v. Rombough, (1924) S C R 600.
4. Crosfield & Sons' Application In re, (1910) 1 Ch 130=79 L J Ch 211=101 L T 587=54 S J 100=26 R P C 837=26 T L R 100.
5. Reddaway v. Banham, (1896) A C 199=65 L J Q B 381=74 L T 289=44 W R 638.

was no question in that case of a registered trade mark; but the plaintiff had used the words as a common law trade mark. As Lord Herschell phrased it (at p. 214)—"he has chosen to employ it as his trade-mark". The judgments of Lord Shand and Lord Davey in the case in (1899) A C 326[6] attach the same importance to the user of the word in question by the person who is claiming that a descriptive word has acquired a secondary meaning as indicating exclusively his goods. Lord Shand (at p. 338) said — "I am of opinion that the word is purely descriptive and was so used by the appellants." Lord Davey relied on the appellants' advertisements as showing that they used the word as descriptive of the goods and not as indicating their origin. Further in (1909) 26 R P C 693[7] Parker J. said that in the absence of evidence of intention to deceive (and there is none such here) the inference of probability of deception must depend on the circumstances of each particular case, including the nature of the word or name the use of which is sought to be restrained; and he adds the following observations most pertinent to the present case:

> It is important for this purpose to consider whether the word or name is prima facie in the nature of a fancy word or name, or whether it is prima facie descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others.

Before and up to 1928 the plaintiff's shredded wheat biscuits were sold in cartons, each containing 12 biscuits. On the top and bottom of each carton appeared the words "Shredded Whole Wheat". On one of the broad sides there was a large picture of a factory across the top front of which were the words "The Canadian Shredded Wheat Company Ltd." : above it were printed the words (in large capitals) "Shredded Wheat" and (in smaller capitals) "Made in Canada" : below it were printed the words "The Shredded Wheat Factory, Niagara Falls, Ontario". On the other broad side there were printed at the top in large capitals the words "Shredded Wheat", and underneath in smaller type and parallel columns a series of statements as to the merits of shredded wheat and directions — such as :

> The crispness of its shreds promotes thorough mastication, which is the first process in digestion. Heat the biscuit in the oven to restore crispness; then pour hot or cold milk over it, adding a little cream. Salt or sweeten to taste.

Below occur the following words in capitals and in separate lines as shown by hyphens :—"Heat the Biscuit in oven to restore crispness"—"As made for 25 years" —"The Canadian Shredded Wheat Co. Ltd."—"Niagara Falls, Ont.: — Canada". There is also a reference to a company in London, England, as being the European distributors. Occupying one of the narrower sides is found a picture of Niagara Falls, and on the picture appeared the words "The Home of Shredded Wheat, Niagara Falls, Ontario". On the other narrower side are found the words "The Original Shredded Wheat," and, immediately underneath, the picture of a bowl containing one of the biscuits and a spoon resting in the bowl with the words "Trade Mark". In addition further below are found the words — "Twelve (12) Biscuits" and, in quotation marks, "Its all in the Shreds".

A consideration of this carton (Ex. 6), which was the form in which the biscuits were, at the relevant times, being sold throughout Canada, makes it clear in their Lordships' view, that the plaintiff was in no way using the words shredded wheat as indicative of the origin of the goods contained in the carton, but was using them only as descriptive of those goods. The indications of origin are the trade-mark in association with the factory at Niagara Falls and the name of the company all of which are prominently displayed. By that carton the plaintiff was telling the public as plainly as it could, that shredded wheat need not necessarily be of its manufacture, but that it was the person who was the original manufacturer of the product known as shredded wheat. The plaintiff was in fact using the words shredded wheat to indicate the thing, not the manufacturer, to indicate the stuff of which the biscuits were composed, not who made them.

An examination of such advertisements as have been put in evidence leads to the same conclusion. Ex. 24 contains photostatic copies of ten advertisements which appeared in issues of The Globe newspaper of Toronto during the years 1908, 1910, and 1913, at times, that is to say, while the patents were still in force. Three, which appeared in 1908, contain no

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6. Cellular Clothing Co. v. Maxton, (1899) A C 326=68 L J P C 72=80 L T 809=16 R P C 397.
7. Burberrys v. Cording, (1909) 26 R P C 693=100 L T 985=25 T L R 576.

indication of the manufacturer. They praise "Shredded Wheat". They recommended a biscuit for breakfast and a biscuit for luncheon, the article in each case being described as made of shredded wheat. One, which appeared in 1910, advertises "Shredded Wheat Biscuits", urges people to try shredded wheat for breakfast, and acquire the shredded wheat habit. This advertisement displays prominently the name of the plaintiff with the words added, "Niagara Falls, Ont.". The remaining six all appeared in the year 1913. They all (except one) contain prominently the name and address of the plaintiff, and in addition the picture of the bowl with a biscuit inside and a spoon resting in the bowl. The bowl is steaming and there is no reference to a registered trade mark. The exception is an advertisement of Triscuit, which is described as "The Shredded Whole Wheat Wafer". In none of these is there any user of the words shredded wheat as indicative of the manufacturer of the biscuit or triscuit. The words are used merely as describing the substance of which the biscuit and triscuit are composed. Ex. 40 contains a series of advertisements which appeared in The Toronto Globe between 1st May 1913, and 30th April 1915. Down to the end of 1914, the advertisements of the biscuits all contain prominently the plaintiff's name and address, a picture of the bowl, biscuit and spoon : and the words shredded wheat appear to describe the stuff of which the biscuit is made. In 1915 the name of the plaintiff drops out of the advertisements, but the picture of the bowl, etc., continues and in addition the following words occur, "Made at Niagara Falls, Ontario". In these advertisements also the words shredded wheat are used merely as describing what is the composition of the biscuits and triscuits ; they invariably state it thus :— "Shredded Wheat is made in two forms, Biscuit and Triscuit". Other advertising matter was put in evidence, viz. Ex. 10, which consisted of a collection of advertisements in the United States by the United States Company which was manufacturing shredded wheat at Niagara Falls, N. Y. These advertisements only become admissible and relevant by reason of the evidence given by Mr. Edwin Wallace. Mr. Wallace had been with the U. S. A. company at Niagara Falls, N. Y., from June 1901, until about 1904 or 1905, when he became superintendent of the plaintiff, a post which he held until 1924. Mr. Wallace was asked to look at Ex. 10 and to state whether that was the way in which during his association with the plaintiff, the product had been advertised and described, and he replied—"This is the advertising which has been carried on for many years." In these advertisements also the words shredded wheat are used descriptively and not as indicating the exclusive manufacture of any person. As an instance the public is warned—

> Look for the picture of Niagara Falls on the carton when you buy Shredded Wheat Biscuit. Any other shredded wheat that may be offered you is merely a poor imitation of the only original Shredded Wheat.

And again—

> When you ask for Shredded Wheat be sure you get the original Shredded Wheat you have always eaten, made at Niagara Falls, N. Y.

In the face of the use by the plaintiff of the words shredded wheat as appearing on the carton (Ex. 6) and in the advertisements, it would appear to their Lordships difficult to believe that the words shredded wheat could have acquired a secondary meaning indicating goods exclusively manufactured by the plaintiff. It is, however, claimed by the plaintiff that the oral evidence establishes the fact. This necessitates a consideration of that evidence. Three classes of witnesses (some 27 individuals) were examined on commission, viz., consumers, retail grocers, and wholesale grocers. They came from every province of Canada with the exception of Ontario and Quebec, but a formal admission was made on behalf of the defendants that similar witnesses from those provinces would, if examined on commission, testify to the same effect. It may thus be taken that the evidence, such as it is, covers the whole Dominion. Without analyzing it in detail, it may be stated that, in their Lordships' opinion, it falls far short of establishing that in 1928, or indeed at any time, the words shredded wheat had acquired a secondary meaning which meant that the goods to which they were applied were the manufacture of the plaintiff and of no one else. The questions (couched often in a leading form) and the answers given are full of ambiguity. It must be remembered that shredded wheat was not only the name given by the inventor to a new product which could be baked into a biscuit, but was also descriptive of the product both as to its composition and its appearance. It must also be remembered that

for a lengthy period the plaintiff enjoyed a legal monopoly of making and selling in Canada the product shredded wheat baked into biscuits, and that, with the negligible exception of some shredded wheat biscuits called muffets, the plaintiff continued to be the sole maker of the product, baked or otherwise. In these circumstances it was inevitable that the words shredded wheat and shredded wheat biscuits should become associated in Canada with the goods of the plaintiff, since many members of the public would get to know that the product shredded wheat was in fact the plaintiff's product.

But this is far from establishing the required meaning of distinctiveness, which must carry with it the feature that the goods distinguished are the goods manufactured by a particular person and by no other. A word or words to be really distinctive of a person's goods must generally speaking be incapable of application to the goods of anyone else. It is on this point that the evidence breaks down. It is full of ambiguities. One is left in doubt whether a witness in speaking of shredded wheat refers to the baked biscuit or to the material of which it is composed; and the answers of many are inconsistent with the witness really believing that the words shredded wheat necessarily indicate goods manufactured by the plaintiff exclusively and by no one else. A few examples will suffice. McDowell, a retail grocer in Vancouver, when asked whether he ever stocked any other shredded wheat than that made by the plaintiff, merely answered in the negative. That is not the answer of a man who believed that shredded wheat was the exclusive manufacture of the plaintiff. To such a man the question is suggesting an impossibility, and would be repudiated as such. The same question is put with the same complacent answer to many other witnesses, of whom it may be sufficient to mention Strathdee (a wholesale grocer of Regina), Braine and May (retail grocers of the same place), and Bull (a retail grocer of Calgary) who also made the following illuminating contribution to the discussion—viz., that when asked for shredded wheat he supplied the plaintiff's carton "because I have nothing else like it in the store," which can only mean because he had no one else's shredded wheat in stock.

The evidence of Cunningham (a consumer living in Calgary) who identified a package of the plaintiff's biscuits by the picture of Niagara Falls on the carton may well be cited as an illustration of the true value of the evidence given in relation to the peculiar circumstances which existed in the present case. Being shown one of the plaintiff's modern cartons which he says he can identify "as a package of shredded wheat" he is asked "Do you know by whom that article is made?" and he answers—"I imagine by the Shredded Wheat Company of Canada." The concluding portion of his examination-in-chief ran thus:

Q. Have you ever known any other article on the market which has been called by the name Shredded Wheat? A. Not to my knowledge.

Q. And when you go into a store and ask for Shredded Wheat, what is it you expect to get? A. Shredded wheat.

Q. This article Exhibit "1"? A. Yes, this is the only one I have ever known so I naturally would not know of any other.

Q. Have you had occasion to order shredded wheat in hotels or restaurants? A. Yes, quite often. I have my breakfast quite often downtown at the Club Cafe on 8th Avenue and that is what I get for shredded wheat.

Q. How is that served to you? In the restaurants or hotels? A. In an ordinary individual bowl, I like bananas with my shredded wheat.

Q. It is not served in the carton? A. No, they have, I believe, individual packages, I think. I have noticed them in restaurants, where you break your own package, but that I am not quite sure of.

Q. But generally speaking? A. That biscuit is the way it is served in an individual bowl.

Q. When you order in that way do you see the package or carton from which the biscuit is taken? A. No. When you order shredded wheat I expect, you naturally expect to get shredded wheat because I have never known anything other than that particular biscuit. I mean as far as I know there has never been anybody else in Canada bring out Shredded Wheat.

Their Lordships think it unnecessary further to analyze the oral evidence. It is, they think, sufficient to say that it fails to show that the words shredded wheat, which were both the name of and descriptive of Perky's invented product, ever acquired the secondary meaning of being distinctive of goods manufactured exclusively by the plaintiff. It would in their opinion be passing strange if they had acquired such a meaning, for it would be a meaning directly contrary to the sense in which those words had been put forward to the public by the plaintiff in its cartons and advertisements. The circumstances existing in the present case and the extreme difficulty of the plaintiff succeeding in establishing the desired secondary meaning

are exactly those which are described by Lord Davey in the well-known case in [1899] A C 326[6] in the passage (at pp. 343-4) which has been aptly cited by McTague J. in his judgment in the present case. It was contended that McTague J. had found the facts upon the issue of distinctiveness in favour of the plaintiff; but their Lordships are unable so to read his judgment. Had he done so he must, they think, have granted relief against infringement of trade marks. He states that the general effect of the evidence is that the words shredded wheat mean to the witnesses the goods of the plaintiff. In view of the monopoly enjoyed under the patent, and the monopoly subsequently in fact enjoyed, the words must necessarily be identified with the plaintiff's goods; but in view of those exceptional circumstances the learned Judge holds that the requisite secondary meaning of exclusive distinctiveness has not been established. To quote his words :

> On the branch of the issue having to do with infringement of the trade mark the conclusion must be that the words whose use is complained of, are common words merely descriptive and have not acquired a secondary meaning in such manner as to give the plaintiff the relief sought.

Their Lordships agree with this finding, which also had the approval of the Court of Appeal. In the result their Lordships agree with both the Ontario Courts in holding that the registrations of the plaintiff's trade marks "Shredded Wheat" were invalid, and that so far as the action is based on infringement of trade marks it fails.

The same result must, they think, ensue in regard to passing off, so far as the alleged passing off is based on the use of the words shredded wheat. Once it is established that these words are both the name of a product and descriptive of that product, the difficulty of establishing a passing off merely by the use of those words in relation to the product is extreme. The case mainly relied upon by the plaintiff was the the case in (1896) A C 199[5] already referred to. In that case the use of words which in fact described the belting there in question, and which in a sense could be said to be its name, was restrained on the ground of passing off. The facts in that case were exceptional and peculiar, and have no real relation to the facts of the present case. For years different manufacturers of belting had made belting consisting of a yarn which was in fact principally composed of camel hair, but which was not known to contain in fact camel hair. Each manufacturer had given the distinctive name of some animal to his belting; e. g. Yak, Buffalo, Llama, Crocodile, etc. The plaintiff had identified his with the Camel; and everyone concerned was under the impression that the plaintiff's name Camel Hair Belting was a fancy name and in no way descriptive. The defendants Banham began in the year 1891 to make belting made of yarn like the plaintiff's and gave it the name of the plaintiff's belting, viz. "Camel Hair Belting". Upon the facts of that case a jury found, and no wonder, that the words (though descriptive in fact of the goods) meant the plaintiff's belting as distinct from the belting of other manufacturers. The decision is one easily to be accounted for on the special facts, viz. that owing to the general but mistaken belief that camel hair was a fancy name, the requisite secondary meaning had in fact been acquired.

The plaintiff's action must in their Lordship's opinion fail so far as it is based on the use of the words shredded wheat, with the result that as against the defendant Bassin the action was properly dismissed. The plaintiff however claims as against Kelloggs a passing-off injunction based upon the allegation that Kellogg's biscuits are of such shape and size, that hotel and restaurant keepers could, if so minded, supply them in response to the request of a customer who in asking for shredded wheat desired to be supplied with biscuits of the plaintiff's manufacture. Their Lordships see no reason for granting any such relief upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat, will not have his request truly satisfied if the product shredded wheat as manufactured by Kellogg's or any other manufacturer is supplied; nor are they satisfied that a customer who really desires a biscuit of the plaintiff's manufacture, will necessarily be deceived by being offered a biscuit of the same shape but perceptibly smaller. Such likelihood of deception requires to be proved and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff's manufacture. The plaintiff has not in their Lordship's opinion made out a case in these proceedings which would justify the granting of a pass-

ing-off injunction based solely on the form of the biscuit.

Some further observations their Lordships think it desirable to make. Their decision has been reached without basing it specifically upon the existence of patents which have expired. Their Lordships however find it difficult to conceive that a manufacturer could in such a case be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that in the case of a patent, long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manufacturer. But difficult as such a case is to prove in the case of a descriptive word, it must be additionally difficult in the case where a word is the name of goods, as well as being descriptive of those goods. The case in (1911) A C 693[8] was peculiar in that the goods there in question which were offered for sale were pieces of washing blue, while the special form of stick which the defendants were restrained from associating with their pieces of washing blue was in effect part of the get-up of the plaintiff's goods. In (1909) 26 R P C 251,[9] while the name of the patented article was "Kalium Meta Sulphite," or more technically "Meta Sulphite of Potassium," the letters or initials K. M. S. were proved to distinguish in the brewing trade, the Kalium Meta Sulphite or Meta Sulphite of Potassium manufactured by the plaintiffs, from the same article of other persons who were making it and calling it by various other names. The defendant was restrained from applying the letters or initials K. M. S. to his goods. In (1931) 48 R P C 350[10] the distinctiveness was proved by admissions made by the defendants themselves but for which, as Bennett J. pointed out, the plaintiffs would have had difficulty in satisfying the Court that descriptive words had become distinctive. Moreover the plaintiff's task in that case was clearly rendered less difficult by the fact that the words there in question included the actual name of the inventor. Each of these cases presented some peculiar feature which brought the necessary proof within the range of possibility.

One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words "Shredded Wheat". The action was dismissed by decree of the U. S. District Court for the District of Delaware ; and on appeal to the U. S. Circuit Court of Appeals for the Third Circuit, the decree was affirmed. Subsequently on re-argument before the same Judges, that decision was reversed, and a decree was entered "enjoining the defendants from the use of the name 'Shredded Wheat' as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark." Their Lordships can only (but with the greatest respect for that Court) express the view that if the facts of that case were similar in all respects with the facts of the present case, they prefer the first judgment of the Circuit Court of Appeals to its later decision. Their Lordships are of opinion that this appeal should be dismissed and will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Blake & Redden.

Solicitors for Respondents —
McKenna & Co.

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8. Edge v. Niccolls, (1911) A C 693 = 80 L J Ch 744=105 L T 459=28 R P C 582=55 S J 737 =27 T L R 555.
9. Boake v. Wayland, (1909) 26 R P C 251.
10. Edison Storage Battery Co. v. Britannia Batteries Ltd., (1931) 48 R P C 350.

*** A. I. R. 1938 Privy Council 152**
(From Calcutta : A I R 1931 Cal 373 S B)
11th March 1938
LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON AND LORD NORMAND (LORD PRESIDENT, COURT OF SESSION) AND SIR SHADI LAL.
Nippon Yusen Kaisha — **Appellants.**
v.
Ramjiban Serowgee — **Respondents.**
Privy Council Appeal No. 36 of 1937.

***(a) Shipping—Sale of gunny bags to Export Company—Sellers to have unpaid vendor's lien on Mate's receipts and goods represented by them — Sellers to deliver goods alongside vessel — Shipping company handing over Mate's receipts to sellers but issued in Export Company's name—Shipping Company issuing bills of lading to Export Company without having Mate's receipts—Subsequent notice by sellers to Shipping Company of their lien—Shipping Company delivering goods to holders of bills of lading — Shipping Company held not wrong in issuing bills of lading without having Mate's receipts nor liable on ground of conversion :** *A I R 1931 Cal 373=134 I C 753 (S B), Reversed.*

The Mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive and its statements do not bind the shipowner as do the statements in a bill of lading signed within the Master's authority. It is however prima facie evidence of the quantity and condition of the goods received and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him. But if the Mate's receipt acknowledges receipt from the shipper other than the person who actually receives the Mate's receipts, and particularly if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will prima facie be entitled and indeed bound to deliver the bill of lading to that person : *(1874) L R 17 Eq 92, Rel. on.* [P 156 C 1, 2]

A broker purchased certain quantity of gunny bags from certain mills and sold them to an Export Company. The terms of the contract were that payments were to be made in cash in exchange of Mate's receipts and so long as the Mate's receipts were in possession of the sellers, the lien of the sellers as unpaid vendors subsisted both on Mate's receipts and the goods they represented until payment in full. The contract stipulated for delivery free alongside export vessel in the port. It was also stipulated that the Mate's receipts must be exchanged for bills of lading. The sellers sent the goods alongside the vessel and obtained Mate's receipts which were issued not in their names but in the name of the Export Company. On the same day, the Shipping Company issued bills of lading to the Export Company, which was named as shipper in the Mate's receipts, without having Mates' receipts in exchange but on the guarantee of the Export Company. The broker paid the sellers and obtained from them the Mate's receipts. The broker tendered them to the Export Company for payment but the Export Company defaulted. Thereupon the broker served a notice on the Shipping company that he had an unsatisfied lien on the goods. By that time the Export Company had sold the goods and indorsed the bills of lading in favour of a bank:

Held (1) that the Shipping Company could not be held liable to the broker for issuing the bills of lading to the Export Company without having Mate's receipts in exchange as the notice served by the broker intimating of his lien was too late.

[P 157 C 1, 2]

(2) that under the contract the sale being free alongside the vessel, the property passed when the goods were delivered alongside, that is, placed in possession of the Shipping Company. Consequently the sellers had, after delivery alongside, nothing left except equitable charge which was only enforceable by equitable remedies against the buyers or person taking with notice of the equity, or a license to resume possession which was personal as between the sellers and the buyers. In neither case was there left to the sellers a common law or possessory lien. The equitable lien or personal license which remained to the seller when the goods were delivered to the ship, did not affect the transferee of the bills of lading so as to found a claim for conversion against the Shipping Company though it might found a claim for breach of contract against the Export Company : *A I R 1931 Cal 373 =134 I C 753 (S B)*, **Reversed.** [P 155 C 2; P 156 C 1; P 158 C 2]

(3) that the onus of proof under S. 178, Contract Act, could not be on the Shipping Company.

[P 158 C 2]

(b) Interpretation of Statutes—Principle.

It is always dangerous to seek to construe one statute by reference to the words of another.

[P 158 C 2]

Sir Robert Aske and W. L. McNair — *for Appellants.*

A. M. Dunne and J. M. Pringle — *for Respondents.*

Lord Wright.—The appellants in this appeal, a Japanese ship-owning company, have been held liable to pay to the respondents, who are brokers and merchants at Calcutta, damages representing the value of certain consignments of jute gunny bags. Before explaining the issues in the case, it will be convenient to state in briefest possible outline the material facts and documents. On 4th May 1926, the respondents entered into three contracts with three mills respectively for the purchase of a total quantity of 250 bales. On the same day they sold the same quantity of 250 bales to a company called the International Export Company, Ltd., carrying on business in Calcutta, who will be referred to as the Export Company. The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers Association. This is the form under which the entire export business in gunnies in Calcutta is conducted. Cls. 3 and 4 of the terms and conditions are material :

3. Payments to be made in cash in exchange for Delivery order on sellers or for Railway receipts or for Dock receipts or Mates' receipts (which Dock's receipts or Mates' receipts are to be handed by a Dock or ship's officer to the seller's representatives.)

4. The buyers hereby acknowledge that so long as such Railway receipts or Mates' receipts (whether in sellers' or buyers' name) are in possession of the sellers, the lien of the sellers as unpaid vendors subsists both on such Railway receipts or Dock's or Mates' receipts and the goods they represent until payment in full.

The contracts stipulated for delivery free alongside export vessel in the port of Cal-

cutta. The Export Company in due course had engaged freight from the appellants. The terms of the engagement are taken as evidenced by a document called a shipping order from the appellants' Calcutta branch to the ship's commanding officer. It was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta and that the receipt of cargo issued by the ship (that is the Mate's receipt) must be exchanged for bill of lading. On 4th May 1926, the Export Company gave shipping instructions to the respondents, which they passed on in the same terms to the three mills. On 17th and 18th May 1926, two of the mills sent alongside certain parcels to the Moji Maru, and the remaining quantities were sent to the Hokata Maru. These two vessels were owned by the appellants, who received the parcels in accordance with the shipping engagement between themselves and the Export Company, and issued Mate's receipts as presented to them for signature by the mills; these receipts were in the following terms :

> Received on board . . . for conveyance to Kobe from the Export Company the undermentioned goods subject to the terms and conditions of the Company's Bills of Lading.

These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms :

> Please receive on board from the above mills the undernoted goods, shipping documents for which have been taken out in the name of Messrs. International Export Co. Ltd., and hand the Mate's receipt to our sircar.

In three cases on the same day as the Mate's receipts were severally given and in one case on the following day, the appellants issued the respective bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the Mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the Export Company by the appellants. At these several dates the respondents were not themselves in possession of the Mate's receipts which they obtained from the mills a few days later against payment. When they thus obtained the Mate's receipts they tendered them to the Export Company, who defaulted in payment. Thereupon the respondents on 27th May 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price and were entitled to retain the relative Mate's receipts, and that bills of lading must not be issued by the appellants until Mate's receipts were surrendered to them. By that time however the Export Company, having the bills of lading in their possession, had resold the goods to purchasers in Japan and had drawn bills of exchange for the price on the purchasers. These bills of exchange they had discounted with a bank (sometimes referred to in the proceedings as the Taiwan Bank, but in fact the International Banking Corporation, a subsidiary of the National City Bank of New York), and had endorsed to them by way of security the bills of lading. On 12th June 1926, the respondents as they could get no satisfaction from the Export Company and as the appellants replied that they had passed bills of lading on the shipper's (that is, the Export Company's) own letter of guarantee and referred the respondents to the shippers, issued their writ, claiming payment of the price from the Export Company and damages from the appellants. In due course the vessels, the Moji Maru, having sailed on 19th and the Hokata Maru on 4th June 1926, proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. An application which had been made by the respondents for an injunction and interim receivership of the goods while the ships were still at sea had been ordered to stand over till the trial.

At the trial, which took place in July 1929, the Export Company did not appear and judgment went against them. But the Judge, Buckland J. dismissed the suit as against the appellants. He held that the appellants could not be held liable to the respondents for issuing the bills of lading without having the Mate's receipts unless they had received notice of the respondents' lien or claim before they did so. For this purpose the written notice of 27th May 1926 was too late. He rejected the respondents' evidence that oral notice had been given on 14th May 1926. "Admittedly," he held on the evidence, "it was a common practice" at the port of Calcutta to issue bills of lading without Mate's receipt. He curtly negatived the contention that the respondents had a special property in the goods which was violated by the delivery at Kobe to the bill of lading holders, so that the respondents were entitled to damages as in trespass or conversion

The respondents having appealed, judgment was given by the Court of Appeal on 22nd July 1930. Rankin C. J., who delivered the leading judgment, agreed with the trial Judge that the appellants were guilty of no breach of duty in issuing the bills of lading to the Export Company which was named as shipper in the Mate's receipts. He gave his reasons for this conclusion shortly as he had already more fully discussed the point in giving judgment in an appeal heard by the Court immediately before, 52 Cal L J 365.[1] But he held that the respondents had a special property or right of possession in the goods, and that the notice of lien and other demands were sufficient to render the appellants guilty of conversion for that notwithstanding the notice and demands, they delivered the goods under the bills of lading, because, he said:

> An indorsee of a bill of lading cannot make a better title to the goods than his indorser upon the principle of purchaser for value without notice.

But as he was of opinion that S. 178, Contract Act, might entitle the Bank to claim as against the respondents a better title than the Export Company to the goods, he ordered a remand to determine that issue. Ghose J., concurred with the Chief Justice, while Lort-Williams J. dissented.

Buckland J. who tried the issue, held that the transaction was of the most ordinary and normal kind in every way and that there was no question on the evidence before him of any want of good faith or of any circumstance that would raise any presumption whatever that the Bank was acting improperly. This finding came before the Court of Appeal which reversed the finding of the Judge, and held that judgment should be entered for the respondents against the appellants for a sum to be agreed or ascertained. Derbyshire C. J., with whom the other members of the Court agreed, held that the onus was on a party seeking to rely on S. 178, to establish affirmatively that he acted in good faith and under circumstances which were not such as to raise a reasonable presumption that he acted improperly, and that the appellants had failed to discharge that onus. The present appeal is from the judgment so entered against the appellants.

The matters to be decided in the appeal are, first, whether the appellants in issuing bills of lading without having the Mate's receipts committed a wrong as against the respondents, and secondly, whether by delivering to the bill of lading holders they converted the respondents' goods that is goods in which the respondents had an immediate right of possession as against the indorsees of the bill of lading which was infringed by the delivery from the ships at Kobe. If both these questions are answered in the negative, the third question which has been dealt with by the Court of Appeal and debated before this Board, does not arise.

Issue 1 to be determined is when under the contract the property passed. The sale was of unascertained goods. Prima facie, on such a sale, the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which in this connexion does not mean expressed assent, but simply that the appropriation has been made in the manner contemplated by the parties. This prima facie rule may however be varied by the terms of the contract or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property prima facie passes when the goods are appropriated by delivery alongside in implement of the contracts. It is however said that cl. 3 of the contract precludes the passing of the property until the price is paid against the Mate's receipts or the other documents specified. That would no doubt be so if cl. 3 were not followed by cl. 4. The contract must however be read as a whole. Cl. 4 provides for a lien of the sellers as unpaid vendors on the Mate's receipts or other documents so long as they remain in the sellers' possession, and on the goods, until payment in full. Can this be reconciled with the reservation of the *jus disponendi* which cl. 3 would import if it stood alone? That depends on the meaning to be attributed to the word "lien" as used in regard to the goods. A Common law lien is possessory and depends on possession, but it also presupposes that the property in the goods has passed. A person cannot have a lien on his own goods. Thus clause 4 imports that notwithstanding cl. 3 the property has passed when the goods were delivered alongside, that is, placed in possession of the shipowners.

1. Nippon Yusen Kaisha v. Mahaliram Ramjidas, (1931) 18 A I R Cal 269=134 I C 82=52 C L J 365 (S B).

The result is that the sellers have parted with both property and possession. "Lien" must therefore be used in a different sense as meaning either an equitable lien or a hypothecation such as that discussed by this Board in (1935) A C 53,[2] or the Common law right or license to resume possession, such as that discussed in 7 B & C 481.[3] The result is that the sellers had, after delivery alongside, nothing left except the equitable charge which is only enforceable by equitable remedies against the buyers or person taking with notice of the equity or a license to resume possession which is personal or contractual as between the sellers and buyers. In neither case was there left to the sellers a Common law or possessory lien, which if it existed would have been a right in the nature of property and would have supported an action in conversion or trespass. The importance of this conclusion in the present case will appear later.

A different state of things would have resulted if the sellers had delivered the goods to the ship in their own name as shippers, so that the ship would have held the goods on their behalf. But they did not. They delivered the goods as being shipped by the Export Company and took a Mate's recipt which expressly stated the name of the Export Company as shippers. In this way the ship received the goods on behalf of the Export Company who had booked the freight from the shipowners. All that the sellers had was possession of, or a lien on, the Mate's receipt. It is, however, on this fact, coupled with the terms of the challan or document delivered to the ship by the mills with the goods and also on the course of business that the respondents rely as justifying their first claim, which is that the issue of the bills of lading to the Export Company, without production of the Mate's receipt was a wrongful act by the appellants as against them, which deprived them of their security on the goods and caused them damage equivalent to the full value.

The Mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, prima facie evidence of the quantity and condition of the goods received and prima facie it is the recipient or possessor who is entitled to have the bill of lading issued to him. But if the Mate's receipt acknowledges receipt from a shipper other than the person who actually receives the Mate's receipt and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will prima facie be entitled and indeed bound to deliver the bill of lading to that person. So it was held by Bacon V. C. in (1874) L R 17 Eq 92,[4] a case in principle not different on its facts from the present. It was held that the indorsement of the Mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the Mate's receipt, though the latter was held as security by the person to whom it had been issued. In that case, as in this, the person who delivered the goods to the ship took the Mate's receipt describing the debtors as the shippers. No doubt if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the Mate's receipt or to anyone but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. (1874) L R 17 Eq 92[4] was decided in 1873 and has been treated as good law ever since, as for instance in the late Judge Carver's "Carriage of Goods by Sea," S. 60. Indeed it is difficult to see what other course a shipowner in a case like this could, in the absence of notice, adopt. He is bound to deliver bills of lading for the goods to the shipper; the shipper here is beyond question the Export Co. who engaged the freight, who are owners of the goods, who are described in the document presented by the mills as the persons in whose name shipping documents have been taken out, and whose names appeared in the Mate's receipts as the persons from whom the goods were received. The mills, who at the respective dates of the Mate's receipts had not been

2. Madras Official Assignee v. Mercantile Bank, (1934) 21 A I R P C 246=152 I C 730=61 I A 416=58 Mad 181=1935 A C 53=104 L J P C 1=152 L T 170=40 Com Cas 143.
3. Howes v. Ball, (1827) 7 B & C 481=1 M & R 288=6 L J (O S) K B 106=31 R R 256.
4. Hathesing v. Laing, (1874) L R 17 Eq 92=43 L J Ch 233=29 L T 734=2 Asp M C 170.

paid by the respondents, might have given notice of lien on their own or the respondents' behalf, or they might have inserted the names of themselves or the respondents as persons shipping the goods and persons to whom the Mate's receipts were to be given. If that were done, the appellants could not properly have issued bills of lading to the Export Co. But if the mills or the respondents had taken the bills of lading in their own name as shippers, they would have become liable on the bill of lading contract and in particular for payment of advance freight. It was not till 27th May 1926, that express notice was given to the appellants not to issue bills of lading, but it was then too late to close the stable door. An attempt to prove express notice given on 14th May 1926, which would have been in time, completely failed. Various matters were relied upon as amounting to implied or indirect notice. It was said that the direction in the mills' document that the receipts were to be given to the mills' sircars amounted to sufficient notice, especially when coupled with the course of business in the trade according to which payment is to be made against the Mate's receipts, which thus constitute a sort of security. But as the receipt itself acknowledges shipment by the Export Co., the mere direction to give the receipt to the mills' sircar appears to be too obscure and ambiguous to countervail the clear recognition of property in the Export Co. There might be many reasons why the receipt should be given to the person who actually delivered the goods to the ship. It is admitted by witnesses on both sides that bills of lading were frequently issued without Mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the world whenever bills of lading are issued without Mate's receipts, and no sinister inference can be drawn from its being taken. It is true that the Export Co. had obtained bills of lading in several cases from the appellants against an indemnity without producing Mate's receipts, and that the appellants had been complaining and demanding delivery of the Mate's receipts, but vendors must have been in some measure aware of what was being done ; it is suggested that they did not wish to make trouble with the shippers, the Export Co. who seem to have been doing a large business until the crash came about the end of May 1926. There is no finding of any fraudulent collusion between the Export Co. and the appellants, or indeed any evidence of that nature.

Under all the circumstances of the case, not only was there no timeous express notice to the appellants, but there is no ground for imputing implied notice. The case must be regarded as one in which shipowners who for their own protection stipulated with the shippers that bills of lading were to be given in exchange for Mate's receipts, waived that provision, and without notice issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if under such circumstances they were held responsible. Their Lordships agree with the conclusion of Sir George Rankin C. J. on this issue.

Issue 2 is alternative. It proceeds on the footing that bills of lading were delivered to the Export Co., but none the less, it is contended, the bills of lading in the Export Co.'s hands did not dispossess the respondents of their unpaid vendor's lien, or the lien for which they stipulated, because they continued to hold the Mate's receipt, and thus they had a right to immediate possession as against the appellants, so that they were entitled to sue in conversion when their notice of 27th May 1926, and their subsequent demands for the goods were refused by the appellants. The primary question thus is whether the respondents still possessed a right to possession, sufficient to found a claim in conversion. The appellants in reply not merely contest the contention that by the possession of the Mate's receipts the respondents retained their lien, but say that the bills of lading had been indorsed to the Bank so as to put an end to the right (if any) of stoppage *in transitu*, and that they were bound to deliver the goods to the indorsee of the bills of lading which they duly did.

The learned Chief Justice on this point was in favour of the respondents, though as already stated, he ordered a remand on the issue based on S. 178, Contract Act, 1872, which was then in force, though since repealed in 1930. Their Lordships with all deference find themselves unable to concur in this conclusion in the respondents' favour. It seems to be based on two propositions, first that under the contractual terms, coupled with the retention of the Mate's receipts, the respondents retained

a lien or immediate right to possession, which was a property interest and not merely an equitable or personal right or license, and secondly, that as the indorsement of a bill of lading passed no better title than the indorser had, the indorsement and transfer to the Bank, passed no greater rights than the Export Company had, so that the Bank could not claim delivery from the shipowners in defeasance of the respondents' possessory title. It is however clear that the conclusion of Sir George Rankin C. J. depended on his view that the respondents had a right in law to immediate possession : indeed it was properly conceded before their Lordships that only such a right would entitle the respondents to claim in conversion, and that a merely equitable right or contractual right or license would not do. Their Lordships agree with Sir George Rankin in his view that the general property passed to the Export Company, but differ from him for reasons stated earlier in this judgment in his view that a right at law to possession remained in the respondents. Thus the whole basis of his conclusion fails.

It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better title than his transferor. But while that is true of title in law, it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can indeed be distinguished from the general legal property in a thing. This is illustrated by (1866) L R 1 P C 219.[5] That case however also illustrates the distinction between legal and equitable rights. The documents of title in that case had been obtained by fraud from the lawful possessor, who had not the general property which belonged to those guilty of the fraud. It was held that an indorsee from those latter persons in good faith for value got a good title, and not a merely defeasible title and in that sense got a better title than his transferors whose possession was defeasible. This is the general rule where the transferor has a title defeasible for fraud, but the transferee takes in good faith and for value. Another illustration of an equitable right which is defeated by the transfer of a bill of lading to a bona fide indorsee for value is the right of stoppage *in transitu*. It follows from the same general rule that the equitable lien or personal license which in their Lordships' judgment was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach of contract against the Export Company, or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants.

In respect of the matters discussed above, there is no difference in substance between English and Indian law. This conclusion renders it unnecessary for this Board to give a decision on the issue raised on the remand under S. 178. It seems however proper for their Lordships to say that as at present advised they would prefer the judgment of Buckland J. to that of the Court of Appeal. Even assuming that the onus of proof under the section is on the appellants, it would seem that they discharged it by the evidence of the Bank, which showed that the transaction was a banking transaction of the most ordinary and normal character. If it were necessary to look further, the presumption of good faith would complete the proof. But their Lordships are far from satisfied that under the section the onus would have lain with the defendants. There are in the section two separate provisos. The onus of proof under the second proviso cannot, it seems, be on persons in the position of the defendants, and if so, it would seem to follow that the onus as to the first proviso must likewise rest in the same quarter. Otherwise an anomalous result would follow. Decisions under other statutes have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another. It may well be that in this section the plaintiff who seeks to impugn what is ex facie a valid disposition should be held to assume the burden of showing bad faith and such other matters as the provisos require to be established in the particular case.

Their Lordships, on the whole case, are of opinion that the appeal should be allowed, the orders of the Court of Appeal should be set aside, and the orders of Buckland J. restored, and that the respondents should pay the appellants' costs in

5. Pease v. Gloahec, (1866) L R 1 P C 219=3 Moore P C (N S) 556=35 L J P C 66=12 Jur (N S) 677=15 L T 6=15 W R 201.

the Court of Appeal and before this Board. They will humbly so advise His Majesty.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellants. —
Waltons & Co.

Solicitors for Respondents. —
Barrow Rogers & Nevill.

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(From Bombay : A I R 1936 Bom 62)

11th March 1938

LORD WRIGHT, LORD ROMER,
SIR LANCELOT SANDERSON,
SIR SHADI LAL AND SIR GEORGE RANKIN.

T. R. Pratt (Bombay) Ltd.—Appellant.

v.

M. T. Ltd.—Respondent.

Privy Council Appeal No. 26 of 1937.

(a) Companies Act (1913), S. 91-B—*S* company financing *P* company through *M T* company for several years—Subsequently *S* taking equitable mortgage of property of *P* for debts really due from *M T*—*M T* company holding almost all shares in *P* company and directors in *P* working as directors in *M T*—*S* having knowledge of this fact during course of business—*P* going in liquidation—Official liquidator held entitled to avoid equitable mortgage in favour of *S*.

Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in S. 91-B and the transaction is voidable at the instance of the company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. [P 162 C 2 ; P 163 C 1]

S company which had been financing *P* company through one *M T* company for seven years decided to have the property of *P* company as security for debt owed really by *M T* company and obtained an equitable mortgage over *P's* property by two indentures. The *M T* company which was putting up *P's* property as security, held almost all the shares in *P* company and the directors of *P* company had for years been directors of *M T* company and these facts were known to directors of the *S* company in course of their business. Winding up proceedings having been started in respect of *P* company, *S* company claimed to be a secured creditor of *P*, by virtue of the equitable mortgage executed in its favour. The Official Liquidator disputed the claim :

Held that the Official Liquidator was entitled to avoid the equitable mortgage on which *S* company based its claim : *(1914) 2 Ch 488, Rel. on.* [P 164 C 1]

(b) Companies Act (1913), Sch. 1, Table A Art. 73—Art. 73 limits directors' authority of borrowing—Intention of Art. 73 is not satisfied by treating it as direction that beyond specified limits further borrowings though not prohibited are to be expended in reduction of existing loan.

Art. 73 limits the directors' authority to borrow. The requirement of the Article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the Article is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. [P 164 C 1]

Where however the loans, although in excess of the authority of the directors, are not ultra vires, the money having been received by the company and applied for its purposes, the Official Liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. [P 164 C 1]

Lionel L. Cohen and S. P. Khambatta —*for Appellant.*

Denys Buckley — *for Respondent.*

Sir George Rankin. — In this case two appeals have been consolidated. They arise out of proceedings taken in the winding-up of a company called T. R. Pratt (Bombay), Limited (herein called "Pratts") which was registered in 1919 under the Companies Act 1913. On 22nd June 1932, it was ordered by the High Court of Bombay to be wound up. The order appealed from is dated 18th September 1935, and was made by a Division Bench on appeal from Kania J. It dealt with two separate but inter-related claims against Pratts — one preferred by E. D. Sassoon & Company, Limited, and the other by M. T. Limited (in voluntary liquidation). The claim of the former (herein called "the Sassoon Company") was to be a secured creditor of Pratts for Rs. 4,91,284 by virtue of an equitable mortgage evidenced by an indenture dated 28th February 1928, and confirmed by another indenture dated 11th August 1931. The claim of M. T. Limited was intended as an alternative to the claim of the Sassoon Company: it was that if the latter failed to establish its claim, M. T. Limited should be admitted to rank as unsecured creditors in respect of the said

sum of Rs. 4,91,284. Kania J. by order dated 11th July 1934, allowed the claim of the Sassoon Company and held that the claim of M. T. Limited was valid in the alternative. The Division Bench (Beaumont C. J. and Wadia J.) disallowed the claim of the Sassoon Company and accepted the claim of M. T. Limited. The appellants before the Board are the Sassoon Company which appeals from the rejection of its claim and the Official Liquidator of Pratts, who disputes both claims.

From 1920 until the liquidation in 1932, Pratts was financed by loans from M. T, Limited who in turn were financed by loans from the Sassoon Company. The course of dealing between M. T. Limited and Pratts, as disclosed by their books, was for interest to be charged at 6 per cent. per annum on the half-yearly balances : on that basis the amount for which M. T. Limited claim to prove is correctly calculated. The Official Liquidator resists the claim of M. T. Limited on the ground that from 1920 to 1928 the sums advanced were in excess of the borrowing powers of the directors of Pratts under Art. 73 of Table A being more than the amount of Pratts' issued share capital which was five lacs of rupees. The consequences of this breach of Art. 73 need not however be considered until the claim of the Sassoon Company has first been examined. There is no dispute as to the execution of the indentures of 1928 and 1931 to both of which all three companies—Pratts, M. T. Limited, and the Sassoon Company—were parties, The main though not the sole objection taken to the Sassoon Company's claim under these instruments is that the directors of Pratts were disqualified under S. 91-B, Companies Act, from entering into them on behalf of Pratts, since they were all directors and share-holders of M. T. Limited. On this question, it is important to enquire whether the Sassoon Company is shown by the evidence to have had notice both in 1928 and in 1931 of the fact that all the directors of Pratts were interested in M. T. Limited. If not, it will be necessary to construe the indenture of 28th February 1928, to determine whether it was intra vires of Pratts and to ascertain the amount due thereunder in the events which have since happened. If however notice must be imputed to the Sassoon Company of the fact that in 1928 and 1931 Pratts' directors were share-holders and directors of M. T. Limited, then the claim of the Sassoon Company fails, and the claim of M. T. Limited must be examined.

Pratts was incorporated in 1919, and by Clause 6 of its memorandum a firm called H. M. Mehta & Co. were appointed its managing agents for 30 years in consideration of their services as promoters. A written agreement dated 5th July 1924, shows the partners of the firm to be H. M. Mehta, Mani H. M. Mehta and F. H. Mehta. Though it was intended to adopt certain draft articles of association, no articles of association were adopted or filed and Table A accordingly applied. The authorized capital consisted of 2000 preference and 3000 ordinary shares of Rs. 100 each, making 5 lacs in all. The 2000 preference shares were held by nominees of H. H. the Maharaja of Gwalior. By 1921, 2990 ordinary shares came to be held by M. T. Limited, and ten by directors of Pratts, who from 1924 onwards also held some 400 shares as nominees of M. T. Limited. The objects of the company were to deal in motor-cars and other vehicles and appliances used therewith but power was taken to hold immovable property to erect buildings and to borrow money. M. T. Limited was registered in 1920. Among the original subscribers to the memorandum appear the names of H. M. Mehta, F. H. Mehta, M. G. Parekh, C. G. Parekh, Sir Victor Sassoon and A. J. Raymond. The promoters were F. H. Mehta and Co., Ltd., in which all these gentlemen were shareholders. F. H. Mehta and Co., Ltd., were by the memorandum of M. T. Limited, made their permanent managing agents. By cl. 3-D of the memorandum one of the objects of M. T. Limited, was to purchase the ordinary shares of Pratts. The authorized capital was twenty lacs of rupees divided into 15,000 ordinary and 5000 preference shares of Rs. 100 each.

The Sassoon Company is a private company limited by shares. The evidence of its head accountant is that the firm of E. D. Sassoon and Co. became a limited company in 1921. Its first directors were Sir Victor Sassoon, R. E. Sassoon, Albert Raymond and another gentleman of the name of Sassoon. In 1921 Mr. A. J. Raymond was added to the Board. From 1924-28 the Board consisted of Sir Victor Sassoon, Mr. R. E. Sassoon, Mr. A. J. Raymond and Mr. Albert Raymond. In 1928 Captain Derek Fitzgerald was added. According to a return dated 13th November 1931, Sir Victor Sassoon had ceased to

be a director and a Mr. Fred Stones had joined the Board. At the end of 1920 the Sassoon Company was debited in the ledger of M. T. Limited, with the cost of 5000 shares in the latter company. On 3rd November 1921, the Board of the Sassoon Company resolved that Mr. A. J. Raymond as managing director be authorized to exercise all the powers that the directors themselves are empowered to exercise as a Board. On 24th April 1924, Mr. A. J. Raymond joined the Board of Pratts. On 3rd April 1928, the minute book of the Sassoon Company records that Mr. A. J. Raymond resigned the office of managing director and also that Mr. Albert Raymond was appointed a managing director and invested with all powers that the directors were empowered to exercise as a Board. On 26th September 1928, the minute book of Pratts records that Mr. A. J. Raymond was given leave of absence for six months and that Mr. Albert Raymond joined the Board of Pratts.

From 1921 onwards M. T. Limited held the whole of the ordinary shares (save ten) of Pratts and every director of Pratts was a shareholder in M. T. Limited. That the management and control of Pratts was in the hands of M. T. Limited is not in doubt as it was clearly the intention with which M. T. Limited was incorporated. According to the annual balance sheets of M. T. Limited the transactions between the three companies can be tabulated as shown hereunder. The Sassoon Company was not treated as a creditor of Pratts but of M. T. Limited and the finance obtained by Pratts was treated as obtained from M. T. Limited;

	Due by Pratts to M. T. Rs.	Due by M. T. to Sassoons. Rs.
1921	12,17,069	6,84,791
1922	13,04,758	7,99,978
1923	12,28,514	8,24.330
1924	10,33,665	8,00,010
1925	7,95,727	9,30.010
1926	7,16,200	8,96,796
1927	6,16,211	8,81,973
1928	5,48,179	7,17,214
1929	4,98,719	6,85,745
1930	4,94,199	6,93,140
22nd June 1932 ...	4,91,284*	

In 1926 the Sassoon Company was minded to obtain security from M. T. Limited which owed money to the Calcutta and Rangoon "branches" as well as to the Bombay house—the total being over 13 lacs of rupees. Mr. Albert Raymond and Sir Victor Sassoon having given "very careful consideration "to the points raised by M. T. Limited, the Sassoon Company wrote to M. T. Limited insisting upon obtaining an equitable mortgage of "your Bombay properties" (8th March 1926), a phrase which by 15th April of that year is found to include a property belonging to Pratts. On 28th April the directors of M. T. Limited not only resolved to grant a mortgage over a property known as Collings Buildings which belonged to M. T. Limited but passed a resolution that by way of security for the nine lacs borrowed from the Sassoon Company and advanced to Pratts an equitable mortgage be created in favour of the Sassoon Company of the property known as 100-B, Hughes Road ("Pratts Building") the property of Pratts. In the end, by way of a fair division between the two properties of the total amount of M. T. Limited's indebtedness to the Sassoon Company, each building was charged for half, viz. 4½ lacs of rupees. On 14th October 1926, the mortgage of Collings Building was completed. As the leasehold title of Pratts to Pratts Building had to be perfected the deeds were not deposited with the Sassoon Company until November 1927. After much correspondence between the Sassoon Company and M. T. Limited and their agents, F. H. Mehta & Co., Ltd., the form of the agreement was settled, and on 23rd February 1928, two Board meetings were held, one at 5 P. M., and the other at 5-15 P. M. At the first, the Board of Pratts resolved upon the execution of the deed and authorized two of its members to affix the seal of the company. Five members were present, H. M. Mehta, A. J. Raymond, C. G. Parekh, Mani H. M. Mehta and F. H. Mehta. At the second, the same persons as the Board of M. T. Limited did the same on behalf of M. T. Limited. On 28th February the indenture was executed : the seal of each company being affixed by the same two directors C. G. Parekh and F. H. Mehta "pursuant to the resolution of the Board of directors." In the case of M. T. Limited, their Secretary, Mr. S. M. Chothia, 'countersigned' as part of the execution of the instrument : in the case of Pratts, the signature of the two directors was witnessed by two persons, Mr. Satgar and Mr. Krishna Rao.

In 1931 it was noticed that the articles of association which had been intended for Pratts had neither been adopted nor filed

* Inclusive of interest up to the end of 1931.

so that Table A applied to the company. As the Secretary of Pratts had not signed the indenture of 28th February 1928, it was doubted whether the execution was a sufficient compliance with Article 76 of Table A. The Sassoon Company called for a deed of confirmation. Accordingly H. M. Mehta, Mani H. M. Mehta and F. H. Mehta, on 4th August 1931, as the Board of Pratts, and on 11th August 1931, as the Board of M. T. Limited, passed the resolutions necessary in that behalf and both seals were duly affixed by M. H. Mehta and F. H. Mehta "pursuant to the resolution of the Board of directors" in each case. Apart from the three gentlemen of the name of Mehta, the Board of Pratts in 1931 included Mr. Albert Raymond who was a member of the Board of M. T. Limited as well as of the Sassoon Company. Mr. M. G. Parekh had died on 6th December 1930. Mr. C. G. Parekh had been on the Board of Pratts and of M. T. Limited since 1921 : he was a share-holder in M. T. Limited and of F. H. Mehta & Co., Ltd. He does not appear to have been a member of either board (Pratts or M. T. Limited) in August 1931, though he was a member of both in the previous year and again in the following year.

It may tend to clearness if the particulars as to the directorates of the three companies concerned are stated in tabular form : the figures of shares held are as at the time of the winding-up of Pratts in 1932. Since 1924 the Boards of Pratts and of M. T. Limited had been constituted of the same persons as in February 1928 :

PRATTS		M. T. LTD.		SASSOONS
DIRECTORS	SHARES HELD	DIRECTORS	SHARES HELD	DIRECTORS
February 1928	*1932*	*February 1928*	*1932*	*February 1928*
Mehta, H. M.	52	Mehta, H. M.	897	Sassoon, Sir V.
Mani, H. M.	52	Mani, H. M.	335*	R. E.
F. H.	52	F. H.	334*	Raymond, A. J.
Parekh, M. G.	51	Parekh, M. G.	524	Albert
C. G.	51	C. G.	524	
Sassoon, Sir V.	50	Sassoon, Sir V.	100	
Raymond, A. J.	50	Raymond, A. J.	200	
August 1931	*1932*	*August 1931*	*1932*	*August 1931*
Mehta, H. M.	52	Mehta, H. M.	897	Sassoon, Sir V.
Mani, H. M.	52	Mani, H. M.	335*	R. E.
F. H.	52	F. H.	334*	Raymond, A. J.
Raymond, Albert	50	Raymond, Albert	100	Albert
				Fitzgerald, D.

* Jointly with H. M. Mehta.

Section 91-B was inserted into the Companies Act (7 of 1913) by Act 11 of 1914 and at the time of the transactions now in question it read as follows :

91-B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted : Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-s. (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company.

Their Lordships are of opinion that the indentures of 28th February 1928 and 11th August 1931 embody a contract or arrangement in which each director of Pratts was concerned or interested within the meaning of the section by reason of his being a director and share-holder in M. T. Limited. The section is a concise statement of the general rule of equity which was fully considered and explained by the Court of Appeal (Cozens-Hardy M. R., Swinfen Eady L. J., and Pickford L. J.) in (1914) 2 Ch 488[1] at page 503 :

Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others. He is bound to do as well for his cestui que trust as he would do for himself. Again the validity or invalidity

1. Transvaal Lands v. Co. v. New Belgium (Transvaal) Land and Development Co., (1914) 2 Ch 488=84 L J Ch 94=112 L T 965=21 Manson 364=59 S J 27=31 T L R 1.

of a transaction cannot depend upon tho extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the cestui que trust, upon which subject no enquiry is permitted.

Subject to the question whether the Sassoon Company had notice of the facts as to the interest of the directors of Pratts, their Lordships think, therefore, that the indentures of 28th February 1928, and 11th August 1931, are voidable by the Official Liquidator. They are not of opinion that S. 91-B would operate to deprive of the benefit of his contract with the company a third party who had no notice of the defect in the directors' authority. This would be contrary to principle : such a person would be entitled to assume that the internal management of the company had been properly conducted : (1856) 6 El. & Bl. 327.[2] But on the facts of the present case their Lordships think it impossible to regard the Sassoon Company as ignorant that in any question between Pratts and M. T. Limited the former had no independent Board and indeed no single director who was not interested on behalf of M. T. Limited. The fact that one of the directors taking part in the resolution of 23rd February 1928 was their own managing director clothed with all the powers of their own Board, is both a striking and important fact but it is not by itself the determining feature of the case. At the meeting of 4th August 1931, no director of the Sassoon company was present. A careful and able argument was addressed to their Lordships by Mr. Romer and Mr. Russell based upon (1896) 2 Ch 743,[3] (1902) 1 Ch 507,[4] (1904) 2 Ch 608.[5] But the facts which affect the validity of the mortgage here in question cannot be regarded as mere items of information which had been acquired by an individual director privately or in his capacity as director of Pratts and which he might or might not be expected to share with his co-directors on the Board of the Sassoon Company.

The Sassoon Company had for seven years been financing Pratts through M. T. Limited, and though the latter was their debtor had determined in 1926 to obtain property of Pratts as security for their debt. Control of Pratts by M. T. Limited had been the basis of their dealings. They were interested as financiers both in the extent and in the method of this control and there had been ample time and opportunity to acquire familiarity with these matters in detail. To what extent Mr. R. E. Sassoon was active as a director is left in doubt upon the evidence but the case of the Sassoon Company would not be improved by assuming that he left the direction of the company's affairs to his co-directors. Up to 1928, Mr. A. J. Raymond and thereafter Mr. Albert Raymond was in primary charge as managing director with full powers. Sir Victor Sassoon may have exercised a less detailed supervision but was certainly an active director. He and Mr. A. J. Raymond were both original subscribers to the memorandum of M. T. Limited and to that of F. H. Mehta & Co., Ltd., the managing agents. Sir Victor himself was one of the first directors of the latter. He had been on the Board of Pratts since 1922 and Mr. A. J. Raymond since 1924. He had been on the Board of M. T. Limited since 1920 and Mr. A. J. Raymond since 1921. He went carefully into the question of security in 1926. It may safely be taken therefore that the Mehtas and the Parekhs and the interests they represented were as well known to the Sassoon directors as the Raymonds and Sassoons were to them. That M. T. Limited, which was putting forward Pratts' property as security, held all save ten of the ordinary shares in Pratts and that the directors of Pratts had for years been directors of M. T. Limited—these are facts which it was the business of the Sassoon Company as financiers to know, and which as their Lordships think the directors came to know in the course of their business. There is no reason to suppose that Sir Victor Sassoon, Mr. Albert Raymond, Mr. A. J. Raymond or Mr. R. E. Sassoon (the directors of the Sassoon company in 1928) would have any difficulty in appreciating them; or would fail to grasp the obvious facts that the directors of Pratts had no real interest in Pratts save through their interest in M. T. Limited, and that the Gwalior nominees were leaving the control of Pratts to M. T. Limited, the holder of the ordinary share capital. These facts cannot be regarded as extraneous

2. Royal British Bank v. Turquand, (1856) 6 El & Bl 327=24 L J Q B 327=1 Jur (N S) 1086.
3. In re Hampshire Land Co. Ltd.; Ex parte Portsea Island Building Society, (1896) 2 Ch 743 =65 L J Ch 860.
4. In re Fenwick Stobart & Co. Ltd., (1902) 1 Ch 507=71 L J Ch 321=86 L T 193=9 Manson 205.
5. In re Payne & Co.; Young v. Payne & Co., (1904) 2 Ch 608=73 L J Ch 849=91 L T 777 =11 Manson 437=20 T L R 590.

information beyond the cognizance of the Sassoon Company; they are facts which had a direct and important bearing on its dealings throughout. All the information which is material was really public property ascertainable without difficulty by anyone under S. 87 of the Act. In their Lordships' opinion the Sassoon Company cannot on the facts disclaim knowledge of the interest of the directors of Pratts in 1928 or 1931 and were not entitled to assume on either occasion that the provisions of S. 91-B had been complied with. No case of ratification by the preference share-holders of Pratts can be made out, and the result is that the Official Liquidator is entitled to avoid the equitable mortgage which is the Sassoon Company's sole ground of claim in the winding-up of Pratts.

The right of M. T. Limited to prove as unsecured creditors for the balance outstanding at the date of the winding-up order was affirmed by both Courts in India. On the ground that from 1921 to 1928 their advances exceeded the limit imposed (by Art. 73 of Table A) upon the powers of the directors of Pratts, the Official Liquidator resists the proof, notwithstanding that at the time of the liquidation (and indeed for three years before) the balance due was within the limit. Their Lordships construe Art. 73 as limiting the directors' authority to borrow. The requirement of the article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. Assuming however that the directors from 1921 to 1928 exceeded their authority in so far as the advances obtained from M. T. Limited exceeded five lacs of rupees, the loans were not ultra vires of the company, and there are concurrent findings of the Indian Courts that the money was received by the company and applied for its purposes. In these circumstances it is plain that the Official Liquidator cannot reduce the balance outstanding at the date of liquidation by disputing the liability of Pratts to repay the whole sums advanced. The question of interest on the sums borrowed in excess of the limit of five lacs is however another matter. Before their Lordships, as before the Division Bench of the High Court, it was contended for the Official Liquidator that the whole account since 1920 should be revised and reconstructed so as to eliminate all charges for interest upon advances in excess of five lacs. In the High Court Beaumont C. J. and Wadia J. refused to entertain this argument which had not been urged before Kania J. and was not mentioned in the memorandum of appeal to the Division Bench. They considered that the Official Liquidator was in great difficulty upon this point by reason that his counsel at the trial had stated that he did not dispute the correctness of Pratts' account in the ledgers of M. T. Limited and had consented to this being marked as an exhibit without any proof. In their discretion, they refused to entertain the Liquidator's claim—then for the first time put forward—to have an account directed upon principles which would eliminate a portion of the interest which has been charged from 1921 onwards. Their Lordships desire to take every care that an admission should not be strained. Mr. Lionel Cohen's argument upon this point merited and has received particular attention. But their Lordships do not find that the High Court has erred in this respect, and see no reason for interfering with the discretion which they have exercised. The appeal of the Official Liquidator must accordingly fail and it becomes unnecessary that their Lordships should discuss the arguments forcefully advanced by Mr. Buckley on behalf of M. T. Limited in defence of their right to interest. Their Lordships will humbly advise His Majesty that both appeals should be dismissed. The Sassoon company will pay half of the costs of Pratts in this consolidated appeal and Pratts will pay the costs of M. T. Limited.

R.M./R.K. *Appeals dismissed.*

Solicitors for Appellant —
T. L. Wilson & Co.

Solicitors for Respondent —
Linklaters & Paines.

**** A. I. R. 1938 Privy Council 165**

(From Allahabad: A. I. R. 1934 All 740)

18th March 1938

LORD WRIGHT, LORD ROMER,
SIR LANCELOT SANDERSON,
SIR SHADI LAL AND SIR GEORGE RANKIN.

Gaekwar Baroda State Railway — Appellant.

v.

Hafiz Habib-ul-Haq and others — Respondents.

Privy Council Appeal No. 67 of 1936, Allahabad Appeal No. 10 of 1934.

**** (a) Civil P. C. (1908), Ss. 86 and 87— Suit as framed against 'Gaekwar Baroda State Railway, through its Manager and Engineer-in-Chief' is not maintainable — Such suit is in reality suit against Ruling Prince and must comply with provisions of Ss. 86 and 87:** *56 All 828 =A I R 1934 All 740=153 I C 824, Reversed.*

A suit cannot be brought against "an assumed name". There must be some juristic entity capable of being sued which is using or is known by the assumed name. [P 167 C 2]

The Baroda State Railway is owned and managed by His Highness the Maharaja of Baroda through his men and is not a corporation. Hence a suit as framed against "the Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" is not maintainable. Such suit is in reality, though not in form, against H. H. the Maharaja Gaekwar of Baroda and must therefore comply with the provisions of Ss. 86 and 87 : *56 All 828= A I R 1934 All 740=153 I C 824*, **Reversed.** [P 168 C 2; P 169 C 1]

(b) Railways Act (1890), S. 1.—Act does not apply to Baroda.

The provisions of the Railways Act are not applicable to the Gaekwar Baroda State Railway. [P 168 C 2]

(c) Civil P. C. (1908), Ss. 86 and 87—Privilege of provisions cannot be waived.

The provisions in Ss. 86 and 87 are statutory and imperative, and having regard to the public purposes which they serve, they cannot be waived. [P 169 C 1]

Sir William Jowitt and Sir Thomas Strangman — *for Appellant*..

C. S. Rewcastle, Abdul Majid and Dingle-foot — *for Respondents.*

Sir Lancelot Sanderson.—This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated 22nd December 1933, which varied but in the main confirmed a judgment and decree of the Subordinate Judge of Agra dated 3rd July 1929. The suit was brought by Mohammad Habib-ullah, who died after the judgment of the trial Court was given and during the pendency of the appeal to the High Court. The respondents to this appeal were brought on the record as his heirs and personal representatives. The defendant in the suit was described as "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" of the said Railway. The plaintiff was a timber merchant, and in April 1923, he entered into four contracts for the supply of sleepers for the said railway in Baroda which are the subject-matters of this appeal. A fifth contract for the supply of shisham wood was also comprised in the suit. The contracts were made in Baroda between the plaintiff and a Mr. Martin who signed the contracts as "Manager and Engineer-in-Chief, Baroda State Railway". No sleepers were delivered in respect of two contracts. The other two contracts were partly performed by the delivery of sleepers. It was alleged on behalf of the defendant that the sleepers which were delivered were not in accordance with the contracts and for this and other reasons which need not now be specified all the contracts were cancelled by a letter dated 3rd May 1924, from Mr. A. T. Houldcroft who was then the manager and engineer-in-chief of the railway, which was said to have been received by the plaintiff on 7th May 1924. The plaintiff filed his suit on 7th May 1927, in the Court of the Subordinate Judge of Agra, claiming Rs. 38,185-12-0 for the balance of the price of the sleepers supplied plus retrenchment money, and Rs.1,16,720-14-0 damages for failure to take delivery of the remainder of the sleepers and wood.

The written statement, which was filed on 10th December 1927, was signed by Mr. C. Allan Cooke, who was then the manager and engineer-in-chief of the said railway. It contained many defences including pleas that the Agra Court had no jurisdiction to try the suit, and that the suit was barred by limitation, but the main question which their Lordships have to consider in this appeal arises in respect of the following plea :

24. The suit not having been filed against the proper party is not maintainable; the defendant railway is owned by H.H. the Maharaja Gaekwar of Baroda, a Sovereign Prince, and is managed by His Highness' Government, the claim against the Manager and Engineer-in-Chief of the defendant railway who is only a paid servant of the State is bad in law.

Many issues were settled and tried by the Subordinate Judge, and the issue in connection with the above-mentioned plea was as follows :

Is the Maharaja Gaekwar of Baroda a necessary party to the suit? Is the suit as framed maintainable?

This raises an important question, for it was alleged on behalf of the defendant that the suit was in reality, though not in form, a suit against H. H. the Gaekwar of Baroda, that it had been framed in the above-mentioned manner because of the difficulty in the plaintiff's way caused by the provisions of Ss. 86 and 87, Civil P. C. of 1908, to which further reference will presently be made, and that it was an attempt to fix H. H. the Gaekwar with liability in this indirect manner. The Subordinate Judge made a decree in favour of the plaintiff for the price of material supplied including retrenchment money Rs. 37,065, interest on the said amount Rs. 14,430, damages Rs. 50,054 minus Rs. 112 for shisham log wood which he held was barred by time, balance Rupees 49,942, total Rs. 1,01,437, with further directions as to interest and costs. The defendant appealed to the High Court, which ordered and decreed that the appeal should be allowed in part, and that the Subordinate Judge's decree should be modified to the extent that the amount decreed thereunder should be reduced by Rupees 7797-9-0 and that in other respects the aforesaid decree should be confirmed and the appeal dismissed.

The defendant applied to the High Court for leave to appeal to His Majesty in Council and the grounds of his application admittedly included substantial questions of law. The learned Judges of the High Court allowed the application and certified that;

As regards the value and nature of the case it fulfils the requirements of S. 110 of Act 5 of 1908.

A preliminary objection was taken by learned counsel on behalf of the plaintiff-respondents that the appeal was incompetent for non-compliance with the provisions of the Civil Procedure Code, Ss. 109 and 110. In support of this contention reference was made to the judgment of the learned Judges of the High Court who granted the above-mentioned certificate. In that judgment it was stated that :

The valuation of the suit in the Court below being above Rs. 10,000 and the valuation of the proposed appeal to His Majesty in Council being also above Rs. 10,000 and the Courts in India having differed, the case satisfies the requirements of law under S. 110, Civil P. C., and we certify accordingly.

The point which was taken by the learned counsel was that the learned Judges were wrong in holding that the Courts in India had differed, inasmuch as the decree of the Subordinate Judge was confirmed by the High Court in all respects, except that the amount decreed by the Subordinate Judge in the plaintiff's favour was reduced by Rs. 7797-9-0.

It was argued that the decree of the High Court really affirmed the decree of the Court immediately below, and therefore that the ground relied on by the learned Judges for granting the certificate was wrong. Several cases relating to this question were cited to their Lordships and it appears that the decisions therein are not altogether consistent, but their Lordships do not propose on this occasion to consider them in detail or to give any decision upon the point. The reason for their Lordships' conclusion in this respect, is that even if the decree of the High Court did affirm the decree of the Subordinate Judge (which their Lordships do not decide), it is obvious that the appeal involves substantial questions of law and as the value of the subject-matter of the suit and of the appeal was above Rupees 10,000, the learned Judges were right in granting the certificate. Indeed the learned counsel for the plaintiff-respondents frankly admitted that this was a case in which their Lordships, if it were necessary, would properly grant special leave to appeal by reason of the important questions of law involved.

The Subordinate Judge in his judgment recorded the admission made on behalf of the plaintiff in the trial Court that the above-mentioned railway is

neither a State railway nor a company railway but is owned and managed by His Highness the Maharaja of Baroda through his own men,

and it is to be noted that in the course of some interlocutory proceedings before the trial the plaintiff declined to make His Highness the Gaekwar a defendant in the suit. The Subordinate Judge however found it possible to make a decree, as already stated, in the plaintiff's favour, holding that the railway was a corporation within the meaning of the Civil Procedure Code, and that it possessed a locus standi of its own before the law Courts and could be sued in its own name through the head of the railway department. This conclusion was based largely upon the construction which the Subordinate Judge placed upon the provisions of 42 & 43 Vict., c. 41 and the Railways Act (Act 9 of 1890), which

the learned Judge considered were applicable to the Gaekwar Baroda State Railway. The High Court came to the same conclusion and held that the defendant railway is a corporation, of which H. H. the Gaekwar is the owner.

One of the learned Judges in the High Court noted in his judgment that the plaintiff was not suing a Ruling Prince, and that he was not trying to execute his decree against such a Prince, but stated that "what he wants is a decree against the defendant railway which is the property of a Ruling Prince." He held further that it was open in India to the plaintiff to obtain his object so long as he did not contravene the express provisions of the Code of Civil Procedure, and expressed the opinion that the position was

that the owner of the corporation carries on business under an assumed name and the suit therefore can be instituted against that assumed name without in any manner infringing the provisions of S. 86, Civil P. C.

The other learned Judge agreed with the conclusions arrived at by his learned brother and added that in his opinion the case was governed by O. 30, R. 10, Civil P. C. With all respect to the learned Judges, their Lordships are unable to assent to the propositions and conclusions contained in their judgments. The provisions of Ss. 86 and 87, Civil P. C., 1908, are as follows :

86.—(1) Any such Prince or Chief and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued: but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or (b) by himself or another trades within the local limits of the jurisdiction of the Court, or (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the Gazette of India, authorize a Local Government and any secretary to that Government to exercise, with respect to any prince, chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immovable property sue, without such consent as is mentioned in this section, a prince, chief, ambassador or envoy from whom he holds or claims to hold the property.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

The sections relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. H. H. the Gaekwar is a Sovereign Prince within the meaning of these sections, and it was admitted by counsel on behalf of the plaintiff-respondents that no certificate had been obtained as provided by S. 86, and further that no such certificate could have been obtained as none of the conditions contained in S. 86 (2) (a), (b) and (c) were applicable to this case. With regard to the above-mentioned statement as to the position, it is obvious that a suit cannot be brought against "an assumed name". There must be some juristic entity capable of being sued which is using or is known by the assumed name. It was however held by the learned Judges of the High Court that the

defendant railway came into existence under a grant from the Sovereign power and it is therefore a Corporation though its owner is one person (His Highness the Maharaja of Baroda) and not several persons.

Their Lordships cannot find any evidence in the record to justify the above-mentioned finding and indeed the learned counsel who appeared for the plaintiff respondents admitted, and in their Lordships' opinion rightly admitted, that he was not able to support the judgment of the High Court on this or any of the grounds mentioned therein. The learned counsel however contended that the conclusion at which the Courts in India arrived, viz. that the railway was a corporation capable of being sued, was correct, and that he could support the High Court's decision on a ground not considered by the Courts in India. He argued that the question whether the railway was a corporation was a question of fact and must be determined in accordance with the law of the State of Baroda. For this proposition he relied upon two cases,

viz. (1923) 2 K B 682[1] and (1933) A C 289[2] and especially on the following passage in Lord Wright's opinion at p. 297 :

English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law.

It was contended that by analogy the Courts in British India should recognize the railway as a juristic person, inasmuch as it could be shown from the materials in the record of this case that the railway had been established in the State of Baroda as a corporation. The evidence which was mainly relied upon to establish the above contention was a notification which was under the heading "Supreme Court" No. 77 of 1921-22, dated 16th April 1922. The translation is in the following terms :

SUBJECT :

In regard to suits arising out of the dealings relating to the State railway not being deemed as suits against the State (but) to be regarded like other suits.

Suits relating to the State railway not to be deemed as suits against the State but to be considered as other suits.

The management of the State railway and the work of keeping supervision over it was entrusted in the first instance to the B. B. & C. I. Ry. Co.

During that time all suits relating to the Railway Administration, like other suits, were filed in any Court having jurisdiction but recently for some time past the management of that Railway has been taken over by the Government of His Highness the Gaekwar in its own hands and its management is carried by the Railway Department of the State. For this reason in order to make it clear whether suits relating to the working of the Railway being taken as ordinary suits, should be filed as before in any Court having proper jurisdiction, or suits of that nature, being regarded as suits against the State should, in the first instance be filed in the Prant Niyayadhishi (District Court). (In order to make that clear) a note herefrom, No. 114, dated 18th February 1922, was issued, relating to Civil Order No 162/82, dated 7th April 1922 as passed, consequently it is decided that suits arising out of the business of the Railway of this State, cannot be regarded as suits against the State, and being considered like other suits, means should be adopted by all concerned to file them as before in any Courts of proper jurisdiction.

It was contended on behalf of the plaintiff-respondents that by this notification H. H. the Gaekwar of Baroda intended to place the Gaekwar Baroda State Railway in the same position as the Bombay Baroda and Central India Railway Company, which apparently had managed the said railway until H. H. the Gaekwar took the management thereof into his own hands and that he thereby intended to establish the railway administration as a corporation. Their Lordships are not able to accept that contention : to place such a construction upon the terms of the notification would be unreasonable and contrary to the ordinary meaning of its terms, which in their Lordships' opinion are quite plain. The notification is no more than a direction regulating the procedure as to suits relating to the railway administration and the working of the State Railway in Baroda. It provided that such suits in Baroda were not to be regarded as suits against the State but were to be considered as other suits and it gave directions as to the Courts in Baroda in which the said suits might be instituted. The notification related to the State of Baroda only and was merely a piece of internal administration with respect to the Courts in Baroda in which the suits therein referred to were to be instituted and the procedure to be adopted in connexion therewith. The notification, in their Lordships' opinion, affords no evidence whatever that H. H. the Gaekwar intended to make the railway administration a legal entity or to establish it as a Corporation.

Reference was made to a further notification No. 92 of 1921-22, dated 17th June 1922. This related to the civil and criminal jurisdiction over the Okhamandal Railway and amongst other matters it provided that the Railways Act of 1890 and the rules relating thereto had been made applicable. It was argued that this notification was of some materiality for the purpose of showing the status of the railway therein referred to. It was however admitted by learned counsel for the plaintiff respondents that the Railways Act of 1890 has no application to Baroda and in their Lordships' opinion the above-mentioned notification affords no assistance to the plaintiff-respondents' case. When asked to state how the alleged corporation was constituted, the learned counsel for the plaintiff respondents contended that the corporation, as established by H. H. the Gaekwar, consisted of the members of the railway administration from time to time. In their Lordships' opinion there is no evidence on the record to support such a contention and it is directly contrary to the admission already mentioned which was

1. Banque Internationale de Commerce de Petrograd v. Gaukassow, (1923) 2 K B 682=92 L J K B 1079=129 L T 725=68 S J 38=39 T L R 574.
2. Lazard Brothers & Co. v. Midland Bank, (1933) A C 289=102 L J K B 191=148 L T 242=76 S J 888=49 T L R 94=44 Ll L Rep 159.

made on behalf of the plaintiff at the trial of the suit, viz.

that the railway is neither a State railway nor a company railway but is owned and managed by His Highness the Maharaja of Baroda through his own men.

Their Lordships are of opinion that the suit was in reality, though not in form, a suit against H. H. the Gaekwar of Baroda and if the judgments of the Courts in India were allowed to stand they would have far-reaching results and might have the effect of nullifying the provisions of Ss. 86 and 87, Civil P. C.

It was further held by the High Court that, even if it be assumed that the suit was in reality against H. H. the Gaekwar of Baroda, the provisions of S. 86, Civil P. C. could not be relied upon because H. H. the Gaekwar had waived his privilege by allowing the defendant railway to defend the suit on its merits and to produce evidence and take the chance of getting a judgment in his favour. Learned counsel for the plaintiff-respondents contended that the above-mentioned finding was correct. Their Lordships cannot accept that contention. In the first place, it appears that the summons was addressed to and served upon the manager of the State railway. He filed a written statement, containing the plea which has already been set out in full, whereby he alleged that the suit was not filed against the proper party and was not maintainable. He applied without success that this issue should be tried as a preliminary issue. No one purported to appear in the suit on behalf of H. H. the Gaekwar of Baroda and there is no ground for saying that he waived his privilege. Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87, Civil P. C., they are imperative, and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court. Their Lordships therefore are of opinion that the suit was not maintainable. In view of this conclusion, it is not necessary to consider the other issues which were raised in the Courts in India. For the above-mentioned reasons, their Lordships are of opinion that the appeal should be allowed, the decrees of the High Court and of the Subordinate Judge set aside, and the suit should be dismissed. The plaintiffs-respondents must pay the costs of the defendant appellant in this appeal, and in both the Courts in India. They will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellant — Gregory Rowcliffe & Co.

Solicitors for Respondents — Douglas Grant & Dold.

****A. I. R. 1938 Privy Council 169**

(From Oudh)

7th April 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Nawab Mirza Mohammad Kazim Ali Khan and another — Appellants.

v.

Nawab Mirza Mohammad Sadiq Ali Khan and others — Respondents.

Privy Council Appeal No. 116 of 1936; Oudh Appeals Nos. 7 and 8 of 1934.

**** Mahomedan Law—Debts—Right of contribution between coheirs respecting debts of deceased—Decree for dower under S. 52, Civil P. C. against all heirs of deceased taluqdar in Oudh—Decree realized only out of non-taluqdari property — Suit for contribution against succeeding taluqdar — Declaration by taluqdar of portion of his property as subject to S. 15, Oudh Settled Estates Act—Taluqdar held liable to contribute according to value of his property at the date of death of the deceased.**

The right and duty of contribution is founded on doctrines of equity; it does not depend upon contract. [P 174 C 1]

The principle or method of which S. 52, Civil P. C. is an expression has always been so operated as not to prejudice the rights inter se of beneficiaries or legatees over whom the creditor has priority. [P 173 C 2]

In the ordinary case of a Muslim whose whole property descended according to his personal law it would be impossible to suggest that an heir was without remedy against his coheirs if by the action of the judgment-creditor under a decree obtained under S. 52, Civil P. C. in a suit brought against all the heirs of the deceased Mahomedan, he was left with less than his proper share of the nett estate of the deceased. His right to contribution would be plain. As a beneficiary, he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution, but the basis of his claim would be the same in each case, viz. the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218, Succession Act. A proper administration of the deceased's

estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. [P 172 C 2; P 173 C 1]

A Mahomedan widow of a taluqdar in Oudh obtained a decree under S. 52, Civil P. C. for dower against all the heirs of the deceased including the taluqdar succeeding the deceased. The decree-holder realized the decretal amount only out of the partible or non-taluqdari estate in the hands of the heirs. The latter brought a suit against the existing taluqdar for contribution contending that as both taluqdari and non-taluqdari properties were liable for the debt, the taluqdari estate should be made to contribute according to its value. The taluqdar had obtained the necessary permission under S. 3, Oudh Settled Estates Act, and declared that certain portion of the taluqa was to be held subject to the provisions of the Act:

Held that the rights of the plaintiffs could not be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late taluqdar made them co-beneficiaries with the existing taluqdar in respect of assets all of which were answerable for the debts of the deceased and the fact that different portions of the assets devolved on different principles in no way defeated the plaintiffs' right to contribution. [P 174 C 1]

Held also that for the purpose of the allocation of debts of the late taluqdar between taluqdari and non-taluqdari properties, the value of his interest in the taluqa was to be taken as it stood at the date of his death. The value of the property comprised in the declaration subsequently made by the taluqdar under the Oudh Settled Estates Act could not be excluded, as "to be or to have vested" in S. 15 of the same Act could not be interpreted to be operating retrospectively. [P 174 C 2]

Dr. A. Majid — *for Appellants.*

W. Wallach, G. S. Rewcastle and P. V. Subba Row — *for Respondents.*

Sir George Rankin.—In this case two appeals by separate sets of plaintiffs have been brought from a decree of the Chief Court of Oudh dated 14th March 1934, setting aside the decree of the Subordinate Judge, Lucknow, dated 1st September 1932, and dismissing with costs a suit for contribution. In both appeals the sole contesting respondent is the defendant in the suit, Nawab Mirza Mohammad Sadiq Ali Khan (herein called Sadiq Ali) who is the taluqdar of Makanpur Rahimabad in the district of Sitapur. The parties are Shia Mahomedans and the questions in dispute have reference to the administration of the estate of Nawab Mohammad Baqar Ali Khan (herein called the late Nawab) who died on 17th January 1921. The relationship of the parties to him and to each other is shown by the pedigree hereunder :

Sharaf Jahn Begam (Plaintiff No. 4) = NAWAB MOHAMMAD BAQAR ALI KHAN = Fakhr Jahan Begam (Plaintiff No. 1)

- Nawab Mirza Mohammad Sadiq Ali Khan (Defendant No. 1)
- Nawab Mirza Mohammad Kazim Ali Khan (Plaintiff No. 5)
- Nawab Mirza Mohammad Naqi Ali Khan. (Died before the institution of the suit. His legal representatives are on the record as Plaintiffs Nos. 4, 6 and 7).
  - Nawab Abid Jahan Begam (Plaintiff No. 2)
  - Nawab Mirza Mohammad Taqi Ali Khan. (Died 19-11-35. His heirs are on the records plaintiffs-appellants party 3, in P. C. Appeal No. 8 of 1934).

The late Nawab left two widows and a family by each. The property of which he was possessed at his death comprised the taluqa of Makanpur Rahimabad, an estate which had been entered under S. 8, Oudh Estates Act (1 of 1869) in List 2 as an estate which according to the custom of the family ordinarily devolved upon a single heir. In addition thereto however, he was possessed at his death of other properties. Litigation to determine whether any or all of his properties were partible or were impartible took place from 1921 to 1931 between his heirs. In 1931 it was decided by this Board that the taluqa descended to Sadiq Ali alone but that the other properties were not governed by any special family custom and that they descended according to the ordinary principles of the Shia school of Mahomedan law : 59 I A 1.[1] The value of the taluqdari property at the date of the death is estimated by the plaintiffs at Rs. 25,62,800 and the value of the partible estate at Rs. 8,90,314. On 31st October 1921, the late Nawab's senior widow Sharaf Jahan Begum brought a suit for her dower against her own three sons, her co-widow Fakhr Jahan Begum, and the latter's son and daughter. These six defendants were impleaded as being with the plaintiff herself the heirs of her

1, Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam, (1932) 19 A I R P C 13=136 I C 385 =59 I A 1=6 Luck 556 (P C).

husband in possession of his property. The claim was for five lakhs of rupees as dower, and on 3rd January 1923, the Subordinate Judge "ordered that the plaintiff's claim be and is hereby decreed for three lakhs of rupees with proportionate costs against the entire estate of Nawab Baqar Ali Khan deceased." An appeal by Sadiq Ali to the Court of the Judicial Commissioner was on 4th March 1924 dismissed.

Thereafter by various execution proceedings, the senior widow Sharaf Jahan Begum as decree-holder realized out of the partible or non-taluqdari property of her late husband sums sufficient to satisfy her dower decree, amounting to Rs. 3,06,855. It is not necessary to detail these proceedings, which took place at different dates between 1924 and 1930. It may however be noted that in May 1924, the first application made by her was against her son, the taluqdar, and asked for attachment and sale of certain taluqdari villages. Such property is protected by the provisions of the Oudh Laws Act, 1876, and by rules made under S. 68, Civil P. C. The sales officer having submitted the case to the Local Government for sanction of an execution sale was informed that as the taluqdar had non-taluqdari property from which the decree could be fully realized, the proceedings to sell in the first instance the ancestral taluqdari villages did not seem proper. This execution application came accordingly to nothing. On 29th April 1931, the suit out of which the present appeals arise was brought by the junior widow, her son and daughter against Sadiq Ali. Originally the senior widow, her two sons, and the representatives of her third son Naqi Ali (who had died) were impleaded as defendants in this suit, but they were afterwards made plaintiffs, leaving Sadiq Ali, the taluqdar, as sole defendant. The main contentions of the plaintiffs were to the effect that both taluqdari and non-taluqdari properties were liable for the dower debt; that as the dower decree was satisfied from the non-taluqdari property alone, the taluqdari estate should be made to contribute according to its value. The defendant, among other pleas, denied that any right to claim contribution arose to the plaintiffs upon the facts alleged. The Subordinate Judge thought it right to deal with certain of the issues before taking evidence upon disputed questions of fact. He found in favour of the plaintiffs that they had a right to contribution in respect that the taluqdari property was liable for the debts of the deceased taluqdar along with the partible property: and that the values of taluqdari and partible properties should be estimated as at the date of the death. His findings on other points need not here be mentioned.

The Chief Court reversed this decision and dismissed the suit. On the main question of the plaintiffs' right to contribution, the view of the learned Judges (Wazir Hasan C. J. and Smith J.) was that as the heirs of a Mahomedan were only entitled to the residue of his partible estate left after the payment of funeral expenses, debts and legacies, the plaintiffs' claim involved the assertion of a right to share in the impartible estate. In their opinion, even had the entire partible estate been exhausted in satisfaction of debts due by the deceased, no right would have arisen to any of the heirs to rehabilitate their shares by means of contributions from the impartible estate. As their Lordships read the joint judgment of the Chief Court, the learned Judges did not doubt that the taluqdari property of the late Nawab was liable for his debts just as much as the partible property. They regarded it as the plaintiffs' misfortune that execution proceedings were taken against the latter. But they held that

> the fact that the result of that action was a benefit to the defendant inasmuch as it saved the impartible estate intact does not create in equity or otherwise in favour of the plaintiffs a right to share in that benefit.

Their Lordships postpone mention of certain other findings of the Chief Court and proceed to consider the correctness of the view that the suit for contribution was not maintainable. The claim of the senior widow Sharaf Jahan Begum for dower was that of an ordinary unsecured creditor against the estate of her late husband. She was not in possession of any property of his in lieu of her dower, still less had she any charge upon any part of his estate. On the other hand, the fact that the debt was for dower did not make it different from any other simple contract debt so far as the taluqdari property was concerned. Sharaf Jahan Begum impleaded all the heirs of her late husband in her suit for dower and obtained a decree against all. It is not necessary now to consider whether the decree which she obtained was in a form to which she was entitled. It was apparently contended in the suit that the proper form of decree would have been

against each heir of her late husband to the extent only of a part of the debt proportionate to that heir's share in the estate. There is some difference of opinion among the High Courts of India upon the proper form of decree in a suit by the creditor of a deceased Mahomedan against one or more of his heirs. In the present case the matter was complicated by the facts that the line or lines of succession to the late Nawab's property were uncertain and in all probability governed only in part by the Mahomedan law; and that the lady was minded to contend that the taluqdari property was liable to answer her claim. The reference in the decree to "the entire estate" shows that Sadiq Ali was not being sued merely as a person entitled to share in the partible estate : otherwise their Lordships attribute no importance to it. Being heiress as well as creditor, the senior widow might doubtless have sued for a declaration that as between partible and impartible estates the latter should bear its proportionate share of the debts, but she did not ask for or get relief in that form. She brought her suit as a creditor in the manner provided by the Code impleading all the heirs as legal representatives [S. 2 (11), Civil P. C.] and she obtained, as the Chief Court has noticed, a judgment of the character contemplated by S. 52 of the Code. In I A Sup Vol. 135[2] this was held by the Board in a suit for dower to be the right form of decree; and in the present case that form of decree was granted, and no appeal was taken therefrom. Each of the defendants to that suit became liable as explained by Sir Barnes Peacock in the case just cited[2] (p. 142) for the whole debt to the extent of assets received by him and the decree could be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of any or all of the defendants. If any defendant was shown to have been in possession of property of the deceased, but to have parted with it, his own assets could be made liable to a like extent unless he proved that he had 'duly applied' the property of the deceased. Such a decree is only a step towards the administration of the deceased's estate and does not complete the administration as between persons whose rights are postponed to creditors. In the ordinary case of a Muslim whose whole property descended according to his personal law, it would be impossible to suggest that an heir was without remedy against his co-heirs if by the action of the judgment-creditor under such a decree he was left with less than his proper share of the nett estate of the deceased. His right to contribution would be plain. As a beneficiary, he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution, but the basis of his claim would be the same in each case, viz. the right to have due administration of deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218, Succession Act, 1925.

The question raised by the present case is whether the plaintiffs as heirs having an interest in a portion of the property left by the deceased and entitled to a due administration of his estate cannot claim to have the debts of the deceased provided for rateably out of the partible and impartible properties which are equally liable for such debts. The estate of the late Nawab was between 1921 and 1931 in a difficult position, since it was doubtful whether any substantial portion of it was divisible or indivisible, and the claim of the senior widow was a heavy claim. That such an estate should be administered by the crude method of leaving it exposed to execution sales at the creditor's choice, is, it may be hoped, unusual. Had there been an executor or administrator in charge or a receiver appointed by the Court, it would have been his duty to take proper measures to pay off the dower debt, and he could not possibly have claimed to saddle either the taluqdari or the non-taluqdari property with the whole of the dower. It would have been the plain right of the plaintiffs to object to any more than a proportionate part of the debt being taken from the partible estate. The view of the Chief Court is that the creditor having levied on partible assets the loss must lie where it has fallen. This, in their Lordships' judgment, is contrary to the rights of the parties : it would moreover open wide the door to chicanery and fraud. A proper administration of the deceased's estate in-

2. Mt. Mulleka v. Mt. Jumela, (1873) I A Sup Vol 135=11 Beng L R 375=3 Sar 220 (P C).

volves and requires a proper allocation of the debts as between properties to which different rules of descent apply. The plaintiffs are not claiming to share in the taluqdary property, because they ask for a proper allocation of the debts as between the partible and the taluqdari properties.

That the right of an heir under the Mahomedan law is a share in the estate after debts and valid legacies have been provided for is undeniable. It is laid down no less than three times in the fourth Sura of the Koran. The principle is not disputed by the plaintiffs or by anyone. Indeed it lies at the root of the plaintiffs' case: because an heir is only entitled beneficially to a share in the residue after payment of debts he is bound to contribute towards debts properly paid by his co-heirs to the extent of his interest. If the Mahomedan law governed the whole matter, the plaintiffs' difficulties would be at an end. The Mahomedan law as to legacies is highly special and need not now be considered; but in providing that the heir takes a share in the nett estate after deduction of the debts of the deceased, the Mahomedan law is in line with other laws including the Hindu law and the second chapter of the Indian Succession Act, 1925. The single heir under Act 1 of 1869 also takes subject to debts. So far as their Lordships are aware, the particular problem presented by the circumstance that part of the deceased's property does not descend according to Koranic principles at all is not dealt with by any of the classical authorities such as the Hedaya, Fatawa Alamgiri or Shuraya. From the standpoint of orthodoxy, such a contingency might well appear not as one to be provided for but as one to be rejected. In any case neither the dicta nor the authorities referred to by the Chief Court are addressed to any such matter. In the cases envisaged by these authorities there is no need to ask what debts shall be discharged out of the property before division into shares as prescribed by Mahomedan law. As all the property would descend by that law all the debts must be first provided for. But, here some property, though liable for debts, is not divisible at all and descends upon different principles unknown to the Mahomedan law: hence the need to ask how much of the debts should be satisfied out of each class of property. Had the authorities cited been relevant to this question and conclusive to the effect that Mahomedan law provided no remedy in such a case as the present, it by no means follows that a British Indian Court would not afford a remedy. In the case cited by the Chief Court, 7 All 822[3] at p. 844, it was pointed out by Mahmood J. that "the *lex fori* regulates all matters going to the remedy, *ad litis ordinationem*." In his view

> upon the death of a Mahomedan owner, his property . . . . immediately devolves upon his heirs in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court (p. 882).

In that case, as is well known, the Full Bench of the High Court at Allahabad, while holding that a decree passed against some only of the heirs did not bind other heirs so as to convey their interest to the auction-purchaser in execution, agreed that in such a case the heirs who were not parties to the decree could not recover their shares from the auction-purchaser without paying their proportionate share of the ancestor's debt for which the decree was passed. This is a particular application of the right to contribution as between co-heirs in respect of the debts of the deceased. It was treated as not depending upon any rule peculiar to the Mahomedan law, but on the general principles of equity. In the present case the Court, having granted to the creditor a decree which enabled her to levy at her choice upon the partible and the impartible estates, cannot as between the defendants refuse to carry the administration beyond that point. The principle or method of which S. 52 of the Code is an expression has always been so operated as not to prejudice the rights inter se of beneficiaries or legatees over whom the creditor has priority. Indeed by its doctrine of marshalling, equity, in days when debts were of different priority and assets were of different classes, ensured that the order in which the assets of a deceased person were answerable for his debts, was ultimately enforced as between persons beneficially interested in the estate [*cf.* Williams on Executors, Vol. 2, pages 1119-1120, 12th Edn. 1930]. Creditors may generally resort to any portion of the estate but the judgment of Lord Eldon in (1803) 8 Vesey Jun 382[4] may be pointed to as showing how this principle has of old been limited and controlled to avert injustice :

3. Jafri Begam v. Amir Muhammad, (1885) 7 All 822=1885 A W N 248 (F B).
4. Aldrich v. Cooper, (1803) 8 Vesey Jun 382=7 R R 86=32 E R 402.

The simple contract creditor therefore has (not) in law any claim against the freehold estate .... But the Court has said the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor ... (p. 394.) In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that if those creditors having a right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. ... Both are in law liable to the creditors, and therefore by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied. (page 395.)

The rights of the plaintiffs cannot be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late Nawab makes them co-beneficiaries with Sadiq Ali in respect of assets all of which are answerable for the debts of the deceased and the fact that different portions of the assets devolve on different principles in no way defeats the plaintiffs' right to contribution. It is not necessary that the plaintiffs should found upon an actual or implied promise in seeking contribution from the defendant in the events which have happened. Whether or not Ss. 69 and 70, Contract Act are wide enough to cover the case, the root of the plaintiffs' claim is their right to a due administration of the estate of the deceased. "The reason given in the books is that in *aequali jure* the law requires equality: one shall not bear the burden in case of the rest:" (1787) 2 Bos & Pul 270=1 Cox 318.[5] "The principle established in (1787) 2 Bos & Pul 270[5] is universal, that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract:" (1885) 31 Ch D 100[6] at p. 109. This has been settled law in India since (1867) 7 W R 377,[7] a Full Bench decision of the High Court at Calcutta in Sir Barnes Peacock's time which contains a careful exposition of the matter from an Indian standpoint. A further decision of the Chief Court remains to be considered. Sadiq Ali made an application under S. 3, Oudh Settled Estates Act, 1917, and on 21st December 1923, having obtained the necessary permission, he duly declared by deed that a certain portion of the taluqa was in future to be held subject to the provisions of the Act. S. 15 of the Act is as follows:

> Except as otherwise provided by this Act, no person entitled to a settled estate shall have power to transfer, dispose of, alienate, convey, charge, encumber or lease the same or any part thereof, or the profits thereof, for any greater or larger interest or time than during his life, nor shall a settled estate, or any part thereof, or the profits thereof, be held by any Court to be or to have vested in such person for any larger or greater interest or time than for his life.

The Subordinate Judge has held that for the purpose of a rateable allocation of the debts of the late Nawab as between taluqdari and non-taluqdari property, the value of his interest in the taluqa is to be taken as it stood at the date of his death in 1921. The Chief Court have held that the portion comprised in the declaration of 1923 is to be valued as a life-interest only. In their Lordships' view, it would be contrary to a sound construction that the words "to be or to have vested" in S. 15 should be interpreted as operating retrospectively upon rights accrued to third parties in the administration of the property of the deceased. On this point their Lordships agree with the view of the Subordinate Judge that the respective values of partible and impartible properties should be ascertained as at the date of the death. They express no opinion upon the quantum of the interest which would be saleable in execution under any decree passed in the present suit. No question arises now upon any of the other matters dealt with by the Courts in India. It may be noted however that on 24th July 1934, Sharaf Jahan Begum petitioned the Chief Court to the effect that she had parted with her interest in the subject-matter of this consolidated appeal to her son Nawab Kasim Ali Khan. This allegation was disputed and the Chief Court did not act upon it as the learned Judges considered that they were *functi officio*. The lady has not been represented before their Lordships. When His Majesty's order is received in India the Chief Court will deal with her application before sending the case back to the Subordinate Judge's Court. Their Lordships will humbly advise His Majesty that these two appeals be allowed, that the decree of the Chief Court be set aside, that the decree of the Subordinate Judge be restored and that the case be remanded to the trial Court for

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5. Deering v. Earl of Winchelsea, (1787) 2 Bos. & Pul 270=1 Cox 318=1 R R 41=126 E R 1276.
6. Ramskill v. Edwards, (1885) 31 Ch D 100=55 L J Ch 81=53 L T 949=34 W R 96.
7. Rambux Chittangeo v. Modhoosoodun Paul Chowdhry, (1867) 7 W R 377=Beng L R Sup Vol 675 (F B).

final disposal. The respondent Nawab Mirza Mohammad Sadiq Ali Khan must pay the appellants' costs in the Chief Court and one set of costs as between the appellants in the two appeals which have been consolidated in the present case.

V.B.B./R.K. *Case remanded.*

Solicitors for Appellants —
Francis & Harker.

Solicitors for Respondents —
Nehra & Co. and Hy. S. L. Polak & Co.

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* A. I. R. 1938 Privy Council 175

(From Sind : A I R 1934 Sind 46)

7th April 1938

LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN

Commissioner of Income-tax, Bombay Presidency and Aden — Appellant.

v.

Messrs. Khemchand-Ramdas — Respondents.

Privy Council Appeal No. 63 of 1937.

(a) Income-tax Act (1922), S. 23 (4)—"Make the assessment"—Power to determine tax payable is implied.

Even if the power to determine the tax payable by the tax-payer be not given expressly by the direction to "make the assessment", such power is plainly implied, reading the section as a whole [P 176 C 1]

(b) Income-tax Act (1922), S. 66 (2) and (3) — Competency of appeal to Commissioner in question — Decision of Commissioner adverse to assessee — Assessee's right to get question decided by Court is not deprived.

Where one of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to the Commissioner was competent in view of the proviso to S. 30 (1), by deciding this question himself adversely to the assessee, the Commissioner cannot deprive the assessee of the right of having the question decided by the Court. [P 178 C 2]

(c) Income-tax Act (1922), Ss. 23 (4), 33, 34 and 35—Final assessment under S. 23 (4) — Assessment cannot be reopened except within time allowed by Ss. 34 and 35—Commissioner's powers under S. 33 can only be exercised subject to provisions of Ss. 34 and 35.

It is true that the Act nowhere imposes any limit of time within which an assessment under the provisions of Ss. 23 and 29 is to be made, and that the service of the notice of demand can therefore be made at any time. But it is not true that after a final assessment under those sections has been made, the Income tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time. When once a final assessment is arrived at, it cannot be reopened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those sections. It is quite possible to suppose that the Income-tax Officer may in every kind of circumstance and after any lapse of time make fresh assessment or issue fresh notices of demand ; or that the Commissioner can direct him to do so. The Commissioner's power under S. 33 can only be exercised subject to the provisions of the Act, of which the provisions in Ss. 34 and 35 are in this respect of the greatest importance. [P 179 C 2; P 180 C 1, 2]

Where therefore an assessment is made under S. 23 (4) of a registered firm assessing it only to income-tax, the assessment is final in respect of income-tax and super-tax. If on the discovery of a mistake the registration is cancelled by the Commissioner under S. 33, the order assessing the firm to super-tax more than one year after final assessment under S. 23 (4) is beyond the powers of Income-tax Officer. [P 178 C 2]

*** (d) Income-tax Act (1922), Ss. 23 (4) and 30, Proviso—Mere fact that assessment purports to have been under S. 23 (4) does not shut out appeal.**

The mere fact that the assessment purports to have been made under sub-s. (4) of S. 23 does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section : *A I R 1929 Lah 593, Approved.* [P 181 C 1]

J. Millard Tucker and W. Wallach — *for Appellant.*

J. M. Pringle — *for Respondents.*

Lord Romer.— The respondents to this appeal are a firm who carry on business at Bunder Abbas and Kerman outside British India but are assessable to taxation in respect of their income under the provisions of the Income-tax Act, 1922. Their total income during the fiscal year ending on 31st March 1926, being in the opinion of the Income-tax Officer, Shikarpur, of such an amount as to render them liable to income-tax under that Act for the year ending 31st March 1927, a notice was served upon them by that official in accordance with the provisions of S. 22 (2) requiring them to make a return of that income. He also served upon them a notice under sub-s. (4) of the same section requiring production of the relevant accounts and documents. Had the respondents thought fit to comply with these notices they would have avoided a good many of the difficulties in which they subsequently found themselves involved. Unfortunately, they completely ignored the notices. The duty of the Income-tax Officer in such circumstances is prescribed by S. 23 (4), of the Act. It is to "make the assessment to the best of his judgment." One of the peculiarities of most Income-tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the

determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. The Indian Income-tax Act is no exception in this respect, and some discussion took place before their Lordships as to the meaning of the words " make the assessment " in S. 23 (4), the question debated being whether the words mean no more than " compute the total income " or whether they include also the determination of the tax payable. It was pointed out that by sub-s. (1) of the same section, which deals with the cases where the officer is satisfied with the return made by the tax-payer, the officer is in terms directed both to assess the total income and to determine the sum payable on the basis of such return. So too, under sub-s. (3), which deals with the cases where the officer is not satisfied that the return is correct or complete. In such cases the sub-section requires that the officer, after hearing evidence as therein mentioned, shall " assess the total income of the assessee and determine the sum payable by him on the basis of such assessment." Sub-s. (4) on the other hand merely directs the officer to "make the assessment to the best of his judgment," and contains no specific reference to a determination by him of the sum payable. Unless, therefore, the word " assessment " in sub-s. (4) is intended to mean something more than the word means in sub-ss. (1) and (3) (and it may be observed that this is by no means improbable in an Income-tax Act), the officer is not in terms given any power to determine the sum payable by the tax-payer. Their Lordships do not find it necessary to express any opinion upon this question, which seems to them to be merely one of academic interest. For even if such a power be not given expressly by the direction to "make the assessment," it is in their opinion, plainly implied, reading the section as a whole. And this view is strongly corroborated by S. 29, which is in these terms :

When the Income-tax Officer has determined a sum to be payable by an assessee under S. 23 . . . the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable.

Now the prescribed form in terms applies to an assessment under S. 23 (4). In the present case the officer in due course acted under the sub-section and made an assessment to the best of his judgment, and at the same time or shortly afterwards served upon the respondents a notice of demand under S. 29. But before dealing further with such assessment and demand, it is necessary to refer to some other provisions of the Act and the rules made thereunder. By S. 55 of the Act it is provided as follows:

In addition to the income-tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature.

By virtue of S. 56, the total income of an unregistered firm is for the purposes of super-tax the total income as assessed for the purposes of income-tax, and an assessment (which here must mean a computation) of total income that has become final and conclusive for the purposes of income-tax is made final and conclusive for the purposes of super-tax for the same year. By S. 58, all the Provisions of the Act (with certain exceptions not material for the present purpose) are made applicable so far as may be to the charge, assessment, collection and recovery of super-tax. By S. 2 (14) the words "registered firm' are defined as meaning a firm constituted as therein mentioned of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner.

On 18th May 1926, the respondents applied to the Income-tax Officer for registration and such registration was effected by him on 17th January 1927. It is now necessary to return to the "assessment" made by the Income-tax Officer under S. 23 (4) and the notice of demand served by him upon the respondents under S. 29. The assessment is dated 17th January 1927 (the same date it may be noticed as that on which the registration of the respondents was effected) and so far as material is in the following terms :

The assessee has failed to return form 1. In spite of several appointments having been given he has failed to produce Bunder Abbas account in Shikarpur books. He is accordingly assessed on enquiries on an income of Rs. 1,25,000 at the maximum rate.

The firm having applied for registration is registered, therefore no super-tax is levied.

Their Lordships have no information either as to the terms of the notice of demand under S. 29 following upon this assessment or as to the precise date upon which it was served upon the respondents. It would seem, however, that it was served

not later than the month of March, 1927. After service of that notice, the Income-tax Officer had done all that was required of him under the Act for the purposes of ascertaining the liability of the respondents to income-tax and super-tax for the fiscal year ending on 31st March 1927. So far too as the respondents were concerned, their assessment for the year (using the word assessment in its most comprehensive sense) had become final and conclusive. For though by S. 30 (1), a right of appeal to the Assistant Commissioner is given to an assessee objecting to the amount or rate at which he is assessed under S. 23 or denying his liability to be assessed under the Act, the sub-section contains a proviso to the effect that no appeal shall lie in respect of an assessment made under S. 23 (4). If however the respondents concluded from all this that after payment of the sum mentioned in the notice of demand all their taxation troubles for that year were ended, they were reckoning without the Commissioner of Income-tax and the powers conferred upon that functionary under S. 33 of the Act. That section, so far as material for the present purpose, is as follows :

(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him. . . .

(2) On receipt of the record, the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the Provisions of this Act, may pass such orders thereon as he thinks fit :

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

The circumstances in which in the present case the Commissioner exercised or purported to exercise the powers conferred upon him by the section have been described by him in the following words :

In January 1928, it was brought to the notice of the Commissioner of Income-tax that the deed of partnership produced by the firm for the purposes of its regsitration was not a valid deed of partnership and that therefore the order granting registration was not correct. Hence a notice under S. 33 of the Act was issued to the firm on 9th January 1928, calling upon it to show cause why the Income-tax Officer's order of 17th January 1927, registering the firm be not set aside. The firm thereupon sent a written representation and after considering it, the Commissioner, in virtue of his powers under S. 33 of the Act, revised on 13th February 1928, the Income-tax Officer's order regarding registration of the firm and ordered its cancellation, directing the Income-tax Officer to take the necessary action thereupon.

It is by no means certain that the Commissioner came to a correct conclusion regarding the invalidity of the registration of the respondents. But, as the law stood at that time, no appeal lay from an order made by the Commissioner under S. 33, and it must be taken that the order cancelling the registration was properly made. Nor is it at all certain that such order could operate retrospectively so as to affect the respondents' liability to super-tax for the year 1927-28. It has, however, been conceded by the respondents in effect that by reason of such order they must be treated as having been an unregistered firm during the fiscal year in question and could have been charged with super-tax for that year had the proper steps been taken for that purpose. Their Lordships are willing to deal with the case on the footing of such concession without expressing any opinion upon the question whether the concession was rightly made. The real question between the parties is whether the action taken by the Income-tax Officer consequent upon the Commissioner's order of cancellation has been effectual to charge the respondents with such super-tax. What he in fact did was to issue an order dated 4th May 1929, which (so far as material) is in the following terms :

The firm was originally assessed to Income-tax on an income of Rs. 1,25,000 as a registered firm. The registration order was subsequently cancelled. The firm is accordingly assessed to super-tax on Rs. 1,25,000 less Rs. 50,000. Issue N. D. accordingly for super-tax of Rs. 5468-12-0.

The N. D (notice of demand) was served upon the respondents three days later.

It is to be observed that the order was issued more than one year after the close of the fiscal year ending on 31st March, 1927, and more than one year after the date of the earlier demand to which reference has already been made. The significance of this fact will appear presently. It should be added that the respondents in no way challenged the figures contained in the order of 4th May 1929. What they did challenge was the power of the Income-tax Officer to make the order at all. Accordingly on 4th June 1929, they appealed to the Assistant Commissioner under S. 30 (1) asking that the order might be set aside. It is clear from the Commissioner's statement cited above that the Income-tax Officer in making the order complained of was acting in pursuance of the directions given to him by the Commissioner under S. 33 ; and at that time, as has already

been stated, no appeal could be brought against an order made under that section. But no such order can be made that is inconsistent with the other provisions of the Act. One of the questions therefore arising upon the appeal, was whether the Income-tax Officer had any power to make the order apart from the direction given to him by the Commissioner. If he had not, the fact that such direction was given was an irrelevant circumstance. Another question arising upon the appeal was as to its competency. Having regard to S. 58 (1) of the Act, the provisions contained in S. 30 (1), giving a right to appeal to the Assistant Commissioner in the case of an assessee denying his liability to be "assessed under the Act," which must mean in that context "charged with tax under the Act," is as applicable to super-tax as it is to ordinary income-tax. But the proviso to that sub-section has to be considered. If the order of 4th May 1929 can properly be described as an assessment under S. 23 (4), no appeal would lie. The appeal came on for hearing on 12th April 1930, and was dismissed by the Assistant Commissioner upon its merits. He did not deal with the question of the competency of the appeal. He merely held that the order of 4th May 1929 was valid, and he confirmed the tax. In so doing he must have been acting under the powers given to him by S. 31 (3) (a), which is in these terms :

> In disposing of an appeal the Assistant Commissioner may in the case of an order of assessment :—
>
> (a) confirm, reduce, enhance, or annul the assessment.
>
> * * * *

In confirming the tax therefore, the Assistant Commissioner must have regarded the order as an assessment within the meaning of the sub-section, as indeed it was. But he expressed no opinion upon the question whether such assessment was one made under S. 23 (4). Following upon the dismissal of their appeal, the respondents then applied to the Commissioner himself, asking him to exercise his powers under S. 33 and set aside both the order of the Income-tax Officer "levying super tax" and the order of the Assistant Commissioner that confirmed such tax. Inasmuch as the Income-tax Officer in "levying super-tax" had merely acted in pursuance of the directions given him by the Commissioner, the respondents could not have felt too certain of success. So they asked him in the alternative to refer the matter to the High Court under the provisions of S. 66 (2) of the Act. That sub-section is, or rather was at that time, as follows :

> (2) Within one month of the passing of an order under S. 31 . . . the assessee in respect of whom the order was passed may by application . . . require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner shall within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

Sub-section (3) of the same section ran as follows :

> (3) If, on any application being made under sub-s. (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may . . . apply to the High Court, and the High Court, if it is not satisfied with the correctness of the Commissioner's decision, may require the Commissioner to state the case, and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

The application to the Commissioner to set aside the order of the Income-tax Officer was rejected by the Commissioner as was the application to state a case. He regarded the case as a clear one of assessment under S. 23 (4) in respect of which no appeal would lie. The appellate proceedings before the Assistant Commissioner and the appellate order were therefore in his opinion illegal. "Hence," said he, "I quash them under S. 33 of the Act." The proceedings having been quashed, there was in his view no order out of which any questions of law could arise and nothing therefore that could be referred to the High Court under S. 66 (2). He accordingly refused to state a case. In their Lordships' opinion the Commissioner was plainly wrong in so doing. One of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to him was competent in view of the proviso to S. 30 (1). By deciding this question himself adversely to the respondents, the Commissioner could not deprive the respondents of the right of having the question decided by the Court. This was the view of the matter rightly taken by the Court, who upon application made to them by the respondents under S. 66 (3) ordered the Commissioner to state a case and refer it to them for their decision. The Commissioner accordingly drew up a statement of the case and referred it with his own opinion thereon to the Court, setting out in the statement at some length his reasons for thinking that he ought never to have been ordered to do so.

The case in due course came on for hearing before Additional Judicial Commissioners, Aston and Rupchand Bilaram, on 22nd January 1934. Their decision was in favour of the respondents. The Commissioner then applied for and obtained from the High Court a certificate that the case was a fit one for granting leave to appeal to His Majesty in Council. The present appeal was thereupon lodged.

At the hearing before the Additional Judicial Commissioners, the arguments would appear to have covered a wide range and to have raised a number of interesting and important questions of law. Their Lordships do not however find it necessary to consider all these questions. It is in their opinion sufficient to dispose of this appeal if the two questions to which they have already called attention be decided, as in their Lordships' opinion they should be decided, in favour of the respondents. These two questions are (i) was the appeal to the Assistant Commissioner from the order of 4th May 1929 competent ? (2) Had the Income-tax Officer any power to make that order in view of the provisions of Ss. 34 and 35 of the Act to which reference will presently be made ? These two questions are so closely related to one another that they can conveniently be considered together.

In order to answer them, it is essential to bear in mind the method prescribed by the Act for making an assessment to tax, using the word assessment in its comprehensive sense as including the whole procedure for imposing liability upon the tax-payer. The method consists of the following steps. In the first place the taxable income of the tax-payer has to be computed. In the next place the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served upon the tax-payer. The second of these steps involves the determination of two sums, namely the sum payable for income-tax and the sum payable for super-tax. The notice of demand in the prescribed form also provides for the sums payable for income-tax and super-tax being specified separately. Considerable discussion accordingly took place before the High Court on the question whether a demand for super-tax in order to be valid ought to be made simultaneously with the demand for income-tax. Aston A. J. C. considered that the demand for super-tax should be made within a reasonable time of the assessment for income-tax, meaning no doubt, by assessment the service of the notice of demand for income-tax which normally completes the assessment. Rupchand Bilaram A. J. C. was of opinion that the demand for super-tax should be made within a reasonable time, and therefore almost simultaneously with the demand for income-tax. Both of them held for this reason (amongst others) that the service of the notice of demand of 4th May 1929 was illegal and inoperative to impose liability upon the respondents. Their Lordships do not find it necessary to express any opinion upon this point inasmuch as in their view and for the reasons which they will now proceed to give it does not call for determination in the present case.

It had been argued on behalf of the appellant that the Act nowhere imposes any limit of time within which an assessment under the provisions Ss. 23 and 29 is to be made, and that the service of the notice of demand can therefore be made at any time. This is true. It had, in effect, been so determined by this Board in 61 I A 10.[1] But it is not true that after a final assessment under those sections has been made, the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time. It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion be reopened except in the circumstances detailed in Ss. 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections. In the present case, the liability of the respondents both for income-tax and for super-tax was determined by the Income-tax Officer on 17th January 1927. In the order made by him on that date he assessed the respondents to income-tax at the maximum rate, but as the respondents were at that time a registered firm he held, as he was bound to hold, that no super-tax was to be levied.

1. Rajendra Nath Mukerjee v. Income-tax Commissioner, (1934) 21 A I R P C 30=147 I C 663=61 I A 10=61 Cal 285 (P C).

On some date before the end of March 1927, he served on the respondents a notice of demand for the tax that he had determined was properly leviable. The assessment having been made under S. 23 (4) no appeal lay in respect of it. The assessment of the respondents was therefore final both in respect of income-tax and super-tax. Their liability in respect of both taxes had been finally determined, and none the less because the question of their liability to super-tax had been determined in their favour. It was, indeed, contended before their Lordships that the assessment could not be regarded as having been determined inasmuch as the Commissioner might at any time, and apparently after any lapse of time however long, cancel the registration of the respondents as a registered firm and so subject the respondents to liability to pay super-tax. Their Lordships would, in any case, hesitate long before acceding to a contention that would lead to so extravagant results. In their opinion, however the contention cannot prevail. The Commissioner's powers under S. 33 can only be exercised subject to the provisions of the Act, of which the provisions in Ss. 34 and 35 are in this respect of the greatest importance. These sections are or were at the material time as follows:

34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

35.—(1) The Income-tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion rectify any mistake apparent from the record of the assessment, and shall within the like period rectify any such mistake which has been brought to his notice by such assessee :

Provided that no such rectification shall be made, having the effect of enhancing an assessment unless the Income-tax Officer has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

(2) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under S. 29, and the provisions of this Act shall apply accordingly.

In view of these express provisions of the Act, it is in their Lordships' opinion quite impossible to suppose that the Income-tax Officer may in every kind of circumstance and after any lapse of time make fresh assessments or issue fresh notices of demand; or that the Commissioner can direct him so to do. In their Lordships' opinion, the provisions of the two sections are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued. In the present case it is a debatable question whether the circumstances were such as to bring it within the provisions of S. 34. It is not necessary to determine that question inasmuch as, in their Lordships' opinion, the case clearly would have fallen within the provisions of S. 35, had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For looking at the record of the assessments made upon them as it stood after the cancellation of the respondents' registration—and the order effecting the cancellation would have formed part of that record—it would be apparent that a mistake had been made in stating that no super-tax was leviable. The Income-tax Officer took no further step however until May 1929, and by then he was hopelessly out of time whichever of the two sections was applicable. Their Lordships are accordingly of opinion that the order of 4th May 1929, was one that the Income-tax Officer had no power to make, and that the second of the two questions to which they have referred must be answered in the negative. It necessarily follows that the first of those questions should be answered in the affirmative. For, the order could only be justified, if at all, as one made, not under S. 23 (4), but under either S. 34 or S. 35. If it was made, as the Commissioner has found in purported exercise of the powers given by S. 23 (4), the assessee nevertheless had a right of appeal to the Assistant Commissioner under S. 30, and the Com-

missioner was in error when he quashed the proceedings on that appeal. For, as was truly said by Sir Shadi Lal in 10 Lah 596[2] at p. 601 :

> The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section.

For these reasons, which do not differ substantially from the opinions expressed by the Court of the Judicial Commissioner, their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Solicitor, India Office.

Solicitors for Respondents —
T. L. Wilson & Co.

2. Duni Chand v. Commissioner of Income-tax (1929) 16 A I R Lah 593=117 I C 69=10 Lah 596=30 P L R 613 (F B).

A. I. R. 1938 Privy Council 181

(From Lahore)

1st April 1938

LORD WRIGHT, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN

Partap Singh and another — Appellants.

v.

Sant Kaur and another — Respondents.

Privy Council Appeals Nos. 1 and 2 of 1937.

Minor — Minor without having guardian appointed by Court or under personal law applicable to him—Compromise by minor and his father's collaterals settling dispute as regards inheritance is not binding on minor—Nor can such transaction be upheld on ground of family settlement.

It is true that if a compromise has been entered into in good faith by the manager of a joint Hindu family or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family; and he was therefore a party to the compromise. The rule does not offend against any law governing a contract. [P 182 C 2]

But where there is no person who has authority either under the law of contract or under the personal law applicable to the minors to make a compromise on their behalf, a compromise entered into by minors settling dispute as regards inheritance between themselves and their father's collaterals is not binding on them. Such transaction cannot be upheld even on the ground of family settlement because a party cannot by describing a contract as a family settlement claim for it an exemption from the law governing the capacity of a person to make a valid contract. [P 182 C 2 ; P 183 C 1]

R. Ritson — *for Appellants.*

J. M. Parikh — *for Respondents.*

Sir Shadi Lal.—On 17th August 1920, Mt. Jiwani, the widow of one Sham Singh died, leaving her surviving two illegitimate daughters, Sant Kaur and Basant Kaur. Mt. Jiwani was the proprietor of four squares of land in the district of Lyallpur in the province of the Punjab. This land was originally in the occupation of her husband as a tenant of Government, but he died in October 1901, without acquiring the proprietary rights by paying the price thereof in compliance with the rules applicable to the acquisition of ownership by a tenant of Government. It was only after his death that Mt. Jiwani paid the price and became the owner of the land in August, 1910. The question of succession to the land arose shortly after her death. In the course of the proceedings taken by the Revenue Officer for the mutation of names in respect of the estate, the right of the daughters to inherit it on the death of their mother was denied by Sham Singh's collaterals who laid claim to the whole of the property as his heirs. There were three collaterals, namely Gujar Singh, the son of Sham Singh's paternal uncle, and Partap Singh and Kartar Singh, the sons of Gujar Singh's brother, Sarmukh Singh. They claimed to exclude the daughters from the inheritance, but the dispute was settled between them and the daughters by a compromise, the terms of which were embodied in a deed executed on 22nd April 1921. The estate was divided among all the claimants, one square was allotted to each of the daughters, and the remaining two squares were awarded to the collaterals. It was however provided that the girls would have only a life-interest in the land assigned to them, without any right of alienation; and that on the death of each, her square would devolve upon the collaterals.

It is common ground that the younger girl, Basant Kaur, was a minor at that time and was represented by Gujar Singh who purported to act as her guardian in consenting to the distribution of the land. The Revenue Officer, who was dealing with the mutation proceedings, directed that the land should be entered in the revenue

record in favour of the various parties in accordance with the settlement arrived at by them. On 15th August 1927, Gujar Singh made a gift of his square to the two girls and executed a deed of gift in their favour. This deed was followed by another document, which he executed on 16th August 1927, by which he relinquished in their favour his right to succeed to their land on their deaths. Thereupon, Partap Singh and Karter Singh brought, on 8th October 1927, an action against the girls and Gujar Singh for a declaration that neither the deed of gift nor the deed of relinquishment should affect their reversionary interest in the property. On 31st October 1927, the girls instituted a suit for possession of the square which had been allotted to Partap Singh and Kartar Singh, and claimed that they (the girls) were entitled to succeed to the whole of the estate belonging to their mother and that they were not bound by the deed of settlement which was entered into during their minority. The trial Judge held the deed of settlement to be binding upon the parties, and while dismissing the girls' suit for possession of one square, granted a declaratory decree in favour of Partap Singh and Kartar Singh with respect only to the deed of gift impeached by them. The girls appealed to the High Court against both the decrees in so far as they were against them, and their appeals were accepted, with the result that their suit for possession of one square was decreed against the collaterals, and the suit brought by the latter for declaration was dismissed in toto.

From the judgment and the decrees of the High Court, Partap Singh and Kartar Singh have brought to His Majesty in Council two appeals, which have been consolidated. The vital question, which requires determination, is whether the deed of settlement is binding upon the girls. As stated already, it was their mother, Mt. Jiwani, who paid the price for the land to Government, and it was not disputed in the trial Court that she had thereby acquired the rights of ownership in the property. Indeed, it is stated by the High Court in their judgment that the learned counsel for Partap Singh and Kartar Singh conceded before them that "but for the deed of 1921, the daughters were the only rightful heirs of Mt. Jiwani." Does that deed create an obstacle in the way of their right to succeed to the whole of the estate left by their mother? *Ex concesso*, the younger girl, Basant Kaur, was a minor on the date of the deed of settlement, but Gujar Singh adopted the role of her guardian for entering into the contract on her behalf. It is however clear that he was neither appointed her guardian by any Court, nor could claim that status under the law applicable to her. He himself wanted a share in the estate, and this claim was adverse to her right to succeed with her sister to the whole of the estate. The rule of law is firmly established that a minor is not competent to make a contract, and as Gujar Singh had no authority to enter into a contract on her behalf, the deed of settlement must be held to be a void transaction as against her.

Whether her elder sister, Sant Kaur, also was a minor at that time is a matter in controversy between the parties. The date of her birth cannot be ascertained with any reasonable certainty, but the circumstances mentioned by the High Court justify the inference that she had not attained the age of majority on the date in question. In any case however, the elder sister would not be bound if the transaction was unenforceable as against the younger. Their Lordships, after examining the relevant material on the record, see no reason to dissent from the conclusion reached by the learned Judges of the High Court. It is not suggested that Gujar Singh or any other person even purported to act on her behalf as her guardian. It is however argued that the transaction should be upheld, because it was a family settlement. Their Lordships cannot assent to the proposition that a party can, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract. It is true that if a compromise has been entered into in good faith by the manager of a joint Hindu family, or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family; and he was, therefore, a party to the compromise. The rule does not offend against any law governing a contract. As regards the transaction for the distribution of squares in the present case, it is not proved that there was any person who had authority

either under the law of contract or under the personal law applicable to the minors, to make the compromise on their behalf, surrendering a moiety of their inheritance to persons who were not entitled to it. Their Lordships have no hesitation in holding that the compromise invoked by the appellants cannot bind the daughters of Mt. Jiwani. They will therefore humbly advise His Majesty that the appeals should be dismissed with costs.

D.S./R.K. *Appeals dismissed.*

Solicitors for Appellants — Nehra & Co.

Solicitors for Respondents — Hy. S. L. Polak & Co.

A. I. R. 1938 Privy Council 183

(From Allahabad)

25th March 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Nathu Lal — Appellant.

v.

Collector of Budaun — Respondent.

Privy Council Appeal No. 7 of 1933; Allahabad Appeal No. 15 of 1931.

Privy Council—Concurrent findings of fact—Practice.

In a case of concurrent findings of fact, it is not the practice of the Board of the Privy Council to go behind those findings. It may be that in exceptional cases, where it is clear that some serious injustice has or may be involved, the rule may be departed from, but that is so only in the most unusual circumstances. The rule is one which obviously it is of the utmost importance to maintain, because the Board does not sit for the purpose of reopening findings of fact in which the Courts below have concurred. [P 183 C 2]

J. Chinna Durai — *for Appellant.*

L. M. D. de Silva — *for Respondent.*

Lord Wright.—Their Lordships do not find it necessary to hear argument in this case from counsel for the respondent. The appeal is from a decree of the High Court at Allahabad which affirmed, subject to what will be said later, a decree of the Subordinate Judge of Budaun. The action was brought by the respondent to obtain a declaration that two deeds, one of 1st and the other of 2nd July 1923 were not binding on the ground that they were obtained by fraud and undue influence. One was a deed of gift of certain properties and the other a deed of sale. The action also claimed that the decree in suit No. 201 of 1923 was also void and should be set aside on the ground that it had been obtained by fraud. The Subordinate Judge, in a careful judgment in which he made all possible assumptions in favour of the appellant, the defendant in the action, found that the allegations were made out and that these two deeds and the decree had been obtained by fraud and undue influence and should be set aside. He accordingly made a decree to that effect. On appeal to the High Court the matter was again fully considered. The facts are carefully discussed by the Court, consisting of Sir Grimwood Mears C. J. and Sen J. They gave their reasons fully, and, as far as their Lordships are concerned, those reasons seem to be completely convincing, but it is not necessary for their Lordships to consider whether they are convincing or not, because this is a case of concurrent findings of fact ; the whole question is one of fact, and under such circumstances it is not the practice of this Board to go behind those findings. It may be that, in exceptional cases where it is clear that some serious injustice has or may be involved, the rule may be departed from, but that is so only in the most unusual circumstances. The rule is one which obviously it is of the utmost importance to maintain, because this Board does not sit for the purpose of reopening findings of fact in which the Courts below have concurred. Their Lordships find it difficult to think of any clearer case for the application of this rule than the present case and on that ground, in their Lordships' opinion this appeal should be dismissed. Mr. Chinna Durai, who has said all that can be said on behalf of the appellant, has referred to sections of the Contract Act and the Evidence Act, but in their Lordships' opinion these sections do not in any way affect the decision of this case. The result is that, in their Lordships' opinion, this appeal, so far as it deals with the substantial matters at issue, already referred to, should be dismissed.

There was, however, a minor matter which is also included in the appellant's appeal and that minor matter is not governed by the rule as to concurrent findings, because in respect of it the High Court took a view in favour of the respondent, adverse to the view taken by the Subordinate Judge, who was in favour of the appellant. The sale deed contained in it a statement of an ostensible consideration of Rs. 8000 and the details of this consideration were given under six heads,

which, when added up, total Rs. 8000. The Subordinate Judge held that as regards the larger portion of that Rs. 8000 the consideration was fictitious and in decreeing that the sale was invalid he made no order for repayment in respect of that alleged or ostensible consideration. That left a sum of Rs. 1760, as to which the Subordinate Judge held that the appellant had made out a case and he ordered as a condition of his judgment the repayment of that amount by the respondent to the appellant. In the High Court a cross-objection was entered by the respondent in regard to that amount and that cross-objection succeeded. The High Court, differing from the Subordinate Judge, held that they were not satisfied that it had been proved beyond reasonable doubt that these three items, Rs. 500, Rs. 1750 and Rs. 60 were debts actually due from Manohar Singh at the date of the execution of the sale deed. They held these items were fictitious and came to that conclusion on an examination of the original documents which are not before their Lordships. In view of all the circumstances of the case, their Lordships do not feel in any way disposed to differ, and do not differ, from that conclusion of the High Court.

The respondent gave notice that he intended to take a preliminary objection, namely that leave to appeal in this case ought not to have been granted by the High Court. In view of the fact that their Lordships are advising His Majesty that the appeal should be dismissed, they do not think it necessary to examine that contention on the part of the respondent. It raises a question which, no doubt, will some day have to be determined by this Board, but, as it is not necessary to determine it in this case, their Lordships are of opinion that it is better to leave it over until it eventually comes to be determined in some other appeal. For all these reasons, their Lordships are of opinion that the appeal fails and should be dismissed with costs and they will humbly so advise His Majesty.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Douglas Grant & Dold.

Solicitors for Respondent —
Hy. S. L. Polak & Co.

**** A. I. R. 1938 Privy Council 184**

(From Lahore : A I R 1935 Lah 251)

29th March 1938

LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN

Mt. Ali Begam and others — Appellants.

v.

Badr-ul-Islam Ali Khan and others — Respondents.

Privy Council Appeal No. 120 of 1936.

**** (a) Civil P. C. (1908), S. 92—Several persons obtaining leave to institute suit do not constitute one plaintiff—Appeal by some of them is competent.**

Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent. There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the case of a suit or of any proceedings in appeal. As sub-s. (2) of S. 92 sufficiently shows the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. The persons who have instituted the suit with the leave of the Collector are not to be deemed to be one plaintiff. One of several plaintiffs in such a suit can appeal on the same terms and conditions as are applicable to suits in general : *View of Jai Lal J. in A I R 1935 Lah 251* **Reversed.**

[P 186 C 2]

Where therefore a suit is instituted by five persons with the leave of the Collector and an appeal is filed by four of them with the concurrence of the fifth who has been made respondent as he has gone on business to another province the appeal is competent as originally brought and an amendment by making such plaintiff an appellant instead of a respondent though unobjectionable is not necessary. [P 186 C 2]

(b) Mahomedan Law—Wakf — Shia Law—Testator creating wakf of his properties for purpose of sarai — Right given to testator's heirs of private residence in sarai does not make dedication invalid.

Where a testator creates a wakf of his properties for purpose of sarai and provides that his heirs shall have right of private residence in sarai, this provision does not show that the testator did not intend to make wakf of the properties nor does it render the dedication illusory or make it invalid either on the ground that the property was not substantially dedicated to charity or on the ground that the wakif had retained a benefit for himself. There is no ground for holding that the right of residence was intended or was likely to exhaust the accommodation of the sarai or could in law be insisted on to the exclusion of the charity. Nor is the right given to the testator's heirs obnoxious to the rule of Shia law which requires a wakif to divest himself of all interest in the property and in its usufruct: *A I R 1927 P C 2, Ref.* [P 187 C 2]

(c) Mahomedan Law—Wakf—On construction of will held there was valid and effective dedication.

A testator dedicated his properties for the purpose of a sarai which was under construction and which was built with the intention of wakf for the benefit of the general public and for the performance of religious ceremonies and for the comfort of every man without charging any rent and was excluded from the rights of relations. The testator gave his brother the powers of the management of the properties but did not use the word "mutwalli" :

Held that upon a proper construction of the will, there was a valid and effective dedication and the fact that the testator did not use the word "mutawalli" was immaterial. [P 188 C 1]

(d) Mahomedan Law — Wakf—Shia law — Direction that property should become wakf after death of person surviving testator—Dedication is invalid.

If a will can be read as intending that on the death of the testator certain properties should become "wakf" it would be in no way unlawful that a life-interest in the usufruct should be reserved for certain beneficiaries. On the other hand, a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications inter vivos. Though the fact that law permits a Shia to create a wakf by will is itself a mitigation of the rigour of this principle, yet the principle is not abrogated for all purposes in the case of a testamentary disposition, nor can it be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future : *28 All 633, Dissent.* [P 188 C 2]

A. M. Dunne and J. M. Parikh — *for Appellants.*

L. P. E. Pugh and Abdul Majid — *for Respondents.*

Sir George Rankin. — On 25th May 1887, Agha Kalb Abid Khan, a Shia Mussalman of Persian origin, died at Amritsar leaving as his heirs a brother Kalb Ali Khan and a sister Mt. Hussaini Khanum. On 3rd March 1887, he had made a will the true construction and effect whereof is the subject of this appeal. He was possessed of a half share in certain immovable property in the District of Farrukhabad which he had inherited from his father and of which the income was expended on an Imambara and other religious purposes at Fatehgarh. In addition thereto he was possessed of immovable property at Amritsar and Lahore valued by him in his will at Rs. 1,73,000 and thereby described, valued and disposed of in detail. Of his properties at Lahore valued by him at about Rs. 60,000, three, of a total value of Rs. 36,200, were given by the will to his brother Kalb Ali and one, valued at Rs. 18,000, to his sister Hussaini Khanum. There remained two parcels of land at or near Lahore — one measuring 45 bighas and valued at Rs. 4000, the other measuring 16 bighas and valued at Rs. 2000. By his will, the testator gave the former to a lady called Mt. Buti and her son Ismail Hussain for their lives and the latter to one Musaffar Ali for his life. The interests in remainder he disposed of by directions that they should be "attached" to the sarai hereinafter mentioned : the validity and effect of these directions need not now be considered, as it is not, in the events that have happened, possible on this appeal to pronounce any binding decision thereon or to give relief in respect thereof. The properties at Amritsar, to which the dispute in the present suit is now confined, are valued in the will at Rs. 1,13,000. This figure includes two properties in Amritsar Cantonment — one called the Mess Kothi (valued at Rs. 2000) and the other called the Small Kothi (valued at Rs. 1000). The income from the former was given by the will to Mt. Buti and her son Ismail Hussain for their lives upon certain conditions. The income of the latter was given to Musaffar Ali for his life upon certain other conditions. A question arises as to the validity of the testator's directions as regards the interests in remainder which question their Lordships will deal with in due course. In addition to these two small properties the will includes as an item of the testator's property at Amritsar, " promissory notes value Rs. 36,000 income Rs. 1490". These promissory notes are included in the figure of Rs. 1,10,000 hereinafter mentioned : the two small properties are not. The main disposition made by the testator in his will is that whereby five properties at Amritsar (in addition to the promissory notes already mentioned)—total value Rs. 1,10,000—are characterized as "pertaining to the sarai" "built and attached to the sarai" " built in connexion with the new sarai." These are (1) a house in the Civil Lines occupying with garden etc. 25 bighas—Rs. 15,000 ; (2) cultivated land nearby—Rs. 5000 ; (3) plots near the church and dak bungalow—Rs. 1000 ; (4) Begum Sahiba's land and garden—Rupees 3000 ; (5) "the sarai under construction"—Rs. 50,000. The main question upon this appeal is whether the true construction and effect of the will is to make these properties wakf for the purposes of a sarai.

Soon after the death of the testator, his brother Kalb Ali was entered in the revenue records as owner of the lands at Amritsar. On 12th May 1892, mutation of the Amritsar property was effected in favour of the sarai. In 1895 Kalb Ali died leaving a widow Mt. Bismillah Khanum, a son Kalb Haidar and a daughter Mt. Ali Begum (defendant 1). On 14th May 1896, mutation of the Amritsar property was effected in the name of the sarai under the management of Kalb Haidar. On 13th May 1907 for Rupees 15,500 Kalb Haidar sold to one Sundar Singh five plots of the Amritsar property above set forth (in all 39 kanals 3 marlas) reciting that he had been in possession thereof as proprietor under his uncle's will of 3rd March 1887. He died in 1909 and on 11th September of that year the Amritsar land was recorded in the name of the sarai under the management of Mt. Bismillah. In 1921 Mt. Bismillah leased 12 kanals of the lands at Amritsar to one Piara Singh (original defendant 3) for 50 years at an annual rent of Rs. 200. Mt. Bismillah died in 1922 and her daughter Mt. Ali Begum took possession of the Amritsar property as her heiress. Mt. Ali Begum has at all times claimed to hold it as absolute owner and has not at any time acknowledged any wakf or dedication. On 7th April 1926, she sold to Nizam-ud-din (defendant 2) 12 kanals 4 marlas of the land at Amritsar.

On 30th June 1906, the present respondents 1 to 5, with the sanction of the Collector under Ss. 92-93, Civil P. C. brought in the Court of the Senior Subordinate Judge at Amritsar the suit out of which this appeal arises. The plaint treating Mt. Ali Begum as de facto mutawalli asked that she be removed from that office and made to account for the wakf property and for the proceeds of the various sales and of the lease to Piara Singh : also that a scheme be framed for the wakf. The trial Judge dismissed the suit (2nd January 1929), holding that though Kalb Abid had dedicated the suit lands for the purposes of a sarai in his lifetime the dedication was invalid as he had retained possession; that he had not made a dedication thereof by his will; that if his will did purport to effect a dedication, that also was invalid having regard to certain provisions in the will as to the testator's heirs. Four of the five plaintiffs appealed to the High Court at Lahore making the remaining plaintiff a respondent to the appeal. The High Court having at the hearing made this plaintiff an appellant instead of a respondent, held that a valid wakf of the sarai was created by the will of Kalb Abid, set aside the decree of the Subordinate Judge and remanded the case to him in order that he might decide whether Mt. Ali Begum should be mutawalli, prepare a scheme, take accounts and give other directions as necessary. From this decree (14th January 1935), Mt. Ali Begum appealed to His Majesty and on her death her representatives have been duly substituted as appellants.

In view of the observations made by the learned Judges in the High Court, Mr. Dunne for the appellants has very properly raised before their Lordships the question whether the appeal as brought to the High Court was competent and if not whether the defect was cured by making the respondent plaintiff an appellant. As it appears that the appeal was brought with this plaintiff's concurrence and that he was made a respondent only because he had gone on business to another province, it is difficult to discern any substance in the preliminary objection. Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent: 48 I A 12.[1] There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-s. (2) of S. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. Their Lordships cannot accept the doctrine of Jai Lal J., in the present case that the persons who have instituted the suit with the leave of the Collector are to be deemed to be one plaintiff, nor do they see any reason why one of several plaintiffs in such a suit should not appeal on the same terms and conditions as are applicable to suits in general. In the present case the

1. Anand Rao v. Ramdas Daduram, (1921) 8 A I R P C 123=62 I C 737=48 Cal 493=17 N L R 37=48 I A 12 (P C).

appeal was in their Lordships' view competent and regular as originally brought: the amendment though unobjectionable was not necessary.

On the main question their Lordships in agreement with the High Court consider that upon the true construction of the will of Kalb Abid the five Amritsar properties above-mentioned were made wakf for the purposes of a sarai and for the specified purposes subsidiary thereto. They are further of opinion that the dedication thereof is valid and in accordance with Shia law. The properties are described as "pertaining to the sarai" in the same sense as the properties given by the will to the testator's brother and sister are described as "pertaining to my brother" and "pertaining to my sister." It is not in doubt that the testator had obtained a plot of land from Major Warburton for the very purpose of being used for a sarai. There are repeated references to this sarai throughout the will and one of the five plots of land now in question (value about Rupees 50,000) is thus described :

> The sarai under construction which is about to be completed. The building operations are going on. It was built with the intention of waqf for the benefit of the general public and for performance of religious ceremonies, such as Ashura, prayers on both the Ids, Muharram and Nauroz etc., and for the comfort of every man, without charging any rent, etc., and is excluded from the rights of relations, etc. But my brother Kalb Ali Khan and his heirs who are his descendants have the right of private residence in it.

The will concludes as follows :—

> It is to be noted that I have given Mirza Kalb Ali Khan, my real brother, the powers for the management of the entire property, left by me, and the power of disposal as owner of every kind like myself. He should use all these powers in obedience to the directions given in this will. He should continue the maintenance allowance of the persons, to whom I have assigned some maintenance, subject to the conditions and for the period mentioned in this will, provided they do their work faithfully, earnestly, honestly, eagerly, and obediently with good conduct and keep him pleased. In case of default of the above conditions or displeasure of my aforesaid brother, or in case of any embezzlement, misappropriation or dishonesty, he has full authority to dismiss them and to stop and confiscate the maintenance fixed. All these powers will be exercised by the male descendants of my brother Kalb Ali Khan, after his death and will thus continue generation after generation. But if the said brother does not care to take this trouble or refuses to manage the above property, it should be made over to the Government and the Deputy Commissioner for management. The Deputy Commissioner alone or by appointing a committee and an advisory board of some Mahomedan gentlemen belonging to the Asna Ashari community, should then manage the waqf property. The same action should be taken in case the male heirs of the said brother should happen to be inefficient and should be guilty of breach of the conditions and misappropriation. If, after my death or during the severe attack of disease or unconsciousness, any one of my dependants is guilty of dishonesty or embezzlement or misappropriation etc., in respect of my property and goods or if my brother suspects the said dependant of these things, then my brother will have the power to dismiss him or to deprive him of the gift.

From these passages it sufficiently appears that the testator's intention was to dedicate the five items of property for a public charitable purpose well known and highly esteemed as pious by the Mussalman law. He not only used the word "wakf" but expressed his intention to benefit the general public and directed that the property should be "excluded from the rights of relations" thus giving ample evidence that he knew what was meant by "wakf" and fully intended to effect a wakf. It is true that after the words "excluded from the rights of relations" come words which say that Kalb Ali and his heirs who are his descendants shall have the right of private residence in the sarai. This would include female heirs who would not necessarily be managers of the wakf. But in their Lordships' view this provision does not show that the testator did not intend to make wakf of the properties nor does it render the dedication illusory or make it invalid either on the ground that the property was not substantially dedicated to charity or on the ground that the wakif had retained a benefit for himself. It is not necessary in this case to pray in aid the provisions of the Mussalman Wakf Validating Act, 1913. There is no ground for holding that the right of residence was intended or was likely to exhaust the accommodation of the sarai or could in law be insisted on to the exclusion of the charity. Nor is the right given to the testator's heirs obnoxious to the rule of Shia law which requires a wakif to divest himself of all interest in the property and in its usufruct. (*cf :* 54 I A 33.)[2]

Again it is true that the testator having set forth in detail each of his properties and his disposition thereof, adds thereto a list headed "Details of Expenses." Having entered "expenses on account of my burial" at Rs. 500 and expenses on account of fast

2. Mt. Abadi Begum v. Mt. Kaniz Zainab, (1927) 14 A I R P C 2=99 I C 669=54 I A 33=6 Pat 259 (P C).

and prayers and the taking of his body to Karbala etc. at Rs. 1500, and the marriage expenses of two girls at Rs. 500 the testator concluded with an entry: "for payment of debt—about Rs. 10,000 or the amount remaining due from me after my death." There is no evidence as to the amount owing by him at his death nor as to the funds from which his debts if any were discharged. The will contains no direction for the payment of debts out of any particular asset nor does it charge any property with his debts. The wide powers of disposal given to the testator's brother, which would include a power of sale, are in their Lordships' opinion to be read, so far as the wakf properties are concerned, as powers given to a manager to be exercised in the course of proper management; and this is indeed comprehended in the direction to "use all these powers in obedience to the directions given in this will." No objection arises in the present case upon the fact that the property dedicated by the will exceeds the one-third share beyond which a Muslim cannot without the consent of his heirs dispose of his property by will: there are concurrent findings of the Courts in India that the testator's heirs consented. Nor does any difficulty arise upon the concluding passages which their Lordships have already cited from the will by reason that the testator does not use the word "mutawalli" when making provision for the management of the sarai and the property devoted thereto. Upon a proper construction of the will their Lordships are of opinion that there was a valid and effective dedication of the five properties abovementioned for the purposes specified. There appears to be no evidence as to the amount or value of the promissory notes outstanding at the testator's death or as to what was done with them.

It remains to consider the two properties in Amritsar Cantonment hereinbefore described as the Mess Kothi and the Small Kothi of which the income was given for life to Mt. Buti and her son, and to Musaffar Ali respectively. The effect of the testator's directions as to the interests in remainder is that on the death of the persons mentioned the property and the income should be "attached to the sarai" and that if either property should be sold during the lifetime of the person entitled for life, he or she should get a specified sum out of the wakf, and the proceeds of the sale should be invested and "attached to the sarai." This raises a question of some nicety in the application of the Shia law. If the will can be read as intending that on the death of the testator these two properties should become "wakf" it would be in no way unlawful that a life-interest in the usufruct should be reserved for the beneficiaries above-named. On the other hand a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications inter vivos :

> If one should say I have appropriated when the beginning of the month has come . . . . the appropriation would not be valid (Shuraya-ool-Islam-Baillie V. II p. 218).

Their Lordships recognize that the decision in 30 I A 94[3] which permits a Shia to create a wakf by will is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in 28 All 633.[4] While not disposed to put a narrow or unduly technical construction on this will, upon a careful consideration of the language used by the testator and of the substance and effect of his dispositions their Lordships find themselves unable to hold that he intended either of the two properties now in question to become wakf property until the tenant for life had died or there had been a sale under the powers conferred by the will. On this view they think that there is no valid dedication of either property, and to this extent the appeal succeeds. They will humbly advise His Majesty that it should be declared that the properties in Amritsar Cantonment described in the will of Agha Kalb Abid Khan as the Mess Kothi and the Small Kothi are not wakf; that subject thereto and save as regards the Lahore properties upon which no decision can be given in this appeal the decretal order of the High Court should stand and this appeal should be dismissed. The appellants must pay to the plaintiffs-

3. Bakar Ali Khan v. Anjuman Ara Begam, (1903) 25 All 236=30 I A 94=8 Sar 397 (P C).
4. Muhammad Ahsan v. Umardaraz, (1906) 28 All 633=3 A L J 387=1906 A W N 146.

respondents one-half of their costs of this appeal.

D.S./R.K. *Appeal partly succeeds.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
Francis & Harker.

A. I. R. 1938 Privy Council 189

(From N. W. F. P.: A I R 1933 Pesh 85)

2nd May 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Malik Harkishan Singh — Appellant.

v.

Malik Partap Singh and others — Respondents.

Privy Council Appeal No. 8 of 1935.

Hindu Law—Partition—True guide to determine jointness or otherwise is person's actings and dealings with estate — There can be partition without actual division of property by metes and bounds — As soon as shares are defined property ceases to be joint — Agreement between members appointing arbitrator to decide shares amounts to severance of joint status—Non-delivery of award is not evidence of renunciation of intention to separate.

It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness or otherwise. According to the Mitakshara law, partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and thenceforth the parties hold it as tenants-in-common. The defining of shares may be expressed by an agreement between them containing a declaration of their shares in the estate. Even an agreement between the members of a joint family, whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement. The fact that no award has been made is not evidence of the renunciation of the intention to separate. Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties : *A I R 1922 P C 353* ; *A I R 1929 Pat 164 and 30 Cal 738 (P C), Rel. on.* [P 190 C 1, 2]

L. P. E. Pugh and L. M. D. de Silva — *for Appellant.*

A. M. Dunne and W. Wallach — *for Respondents.*

Sir Shadi Lal.—Hira Singh, the father of the plaintiff-respondent Partab Singh, resided originally in Dera Khalsa, a village situated in the Rawalpindi District. He admittedly constituted a joint Hindu family with his two sons, Narain Singh and Partap Singh. The family owned ancestral property consisting of a house and agricultural land. In 1872, when Narain Singh was about eight years old and Partap Singh about six years, Hira Singh migrated with his sons from his ancestral village to Abbottabad. He acquired some property at Abbottabad and also carried on business there. Partap Singh was educated by his father, first at Abbottabad, and then at Lahore. He completed his education in 1888, when he went with the Black Mountain Expeditionary Force as a contractor for supplying articles of food and other necessaries to the troops. He earned money in his business of contract, and on his return to Abbottabad, he handed it over to his father. He subsequently went to Rawalpindi and supervised the ancestral property in Dera Khalsa, while his elder brother lived with his father at Abbottabad and helped him in the management of the business there. It appears that Hira Singh and his two sons continued to live as a joint family until January 1918, when Hira Singh died. After the expiry of about nine years Hira Singh's elder son, Narain Singh, died in 1927, leaving his son Harkishan Singh, who is the appellant before their Lordships.

The action which has led to the present appeal was brought by Partap Singh against his nephew, Harkishan Singh, for partition of the property situated at Abbottabad and Dera Khalsa on the allegation that the entire estate belonged to the joint Hindu family consisting of the plaintiff and the defendant, Harkishan Singh, and that the plaintiff is entitled to a moiety thereof. The claim was resisted by Harkishan Singh, who denied the plaintiff's status as a member of the joint family, and pleaded that the property at Abbottabad belonged originally to Hira Singh and Narain Singh as members of a joint family, and that it passed, by survivorship, on the death of Hira Singh to Narain Singh, and on the latter's death to his son, Harkishan Singh. As regards Partap Singh, the defendant did not adopt a consistent attitude. While stating that Partap Singh had separated from the other members of the family, he was not quite clear as to whether Partap Singh

was allotted any property on separation. At one stage of the case he said that all the property in the Rawalpindi District was awarded to Partap Singh, but he subsequently claimed a share even in that property. Indeed, neither party has given a consistent version of the position of the sons of Hira Singh inter se, and no reliance can be placed on their statements.

It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness or otherwise. The trial Judge, upon a consideration of the evidence before him, found that the plaintiff had ceased to be a member of the joint family, but his view was not accepted on appeal by the Court of the Judicial Commissioner at Peshawar, who held the family to be joint, and granted a preliminary decree for partition in favour of the plaintiff. From that decree the defendant has brought this appeal to His Majesty in Council, and the main questions, which their Lordships have to determine, are whether the plaintiff and the defendant constituted a joint Hindu family at the date of the institution of the suit, and whether the property at Abbottabad belonged to that family. There is no proof of actual partition of the joint estate at any time, but there is no doubt that there can be a partition of the joint property without an actual division of the property by metes and bounds. According to the Mitakshara law, by which the parties are governed, partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and thenceforth the parties hold it as tenants-in-common.

The defining of shares may be expressed by an agreement between them containing a declaration of their shares in the estate. Even an agreement between the members of a joint family, whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement : 49 I A 358[1] and 8 Pat 153.[2] The fact that no award has been made is not evidence of the renunciation of the intention to separate. Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties : 30 I A 139.[3] Their Lordships do not find any such agreement defining the shares among the members of Hira Singh's family. The oral evidence adduced by the parties is of a partisan character; but the documentary evidence, though meagre, furnishes a clue to the relations between Hira Singh and his son Partap Singh until 1918 when the former died. It appears that the father used to write letters from Abbottabad to his son at Rawalpindi which were couched in affectionate terms. He made enquiries about the ancestral property in which he took a personal interest. There is no indication in the correspondence that the son had been separated from the father and was treated by him as the sole proprietor of the property at Dera Khalsa.

It is common ground that the father and his two sons were joint when they migrated to Abbottabad and the learned counsel for the appellant is unable to suggest any time during the lifetime of the father when the plaintiff separated from the other members of the joint family and thereby ceased to have any interest in the co-parcenary property. It is contended that a cinema was built by Narain Singh after the death of his father and that the plaintiff did not contribute to the expenses of the building and has therefore no right to a share in it. But the site upon which the cinema was built was acquired by the father in 1886 on a lease of 99 years on a rental of Rs. 5 a year. The cost of the building came out of the profits of the business at Abbottabad which was started by the father. There is no reason for holding that Narain Singh alone was joint with his father in the business and that on the latter's death it devolved upon the former by survivorship. Whether it was a part of

1. Syed Kasam v. Jorawar Singh, (1922) 9 A I R P C 353=68 I C 573=50 Cal 84=49 I A 358 =18 N L R 127 (P C).
2. Balmukund Lal v. Mt. Sohano, (1929) 16 AIR Pat 164=119 I C 817=8 Pat 153=10 P L T 259.
3. Balkishen Das v. Ram Narain Sahu, (1903) 30 Cal 738=30 I A 139 = 8 Sar 489 = 7 C W N 578 (P C).

the joint property of all the members of the joint family, or separate property of the father, both the sons were on his death equally interested in the business and its assets. The defendant cannot therefore sustain his claim to be the exclusive owner of the cinema. Their Lordships have examined the arguments advanced by the learned counsel for the parties and are not prepared to dissent from the conclusion reached by the Court of the Judicial Commissioner. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
T. L. Wilson & Co.

**A. I. R. 1938 Privy Council 191

(From Bombay : A I R 1937 Bom 145)

2nd May 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Secretary of State — Appellant.

v.

Bank of India Ltd. — Respondents.

Privy Council Appeal No. 55 of 1937.

(a) Securities Act (1920), S. 16 — Holder of renewed note holds it free from equities or disputes attaching to prior note.

The holder of a renewed note, obtains a new promise from the Government free from any equities or disputes which might have attached to the prior note. [P 192 C 1, 2]

*** * (b) Securities Act (1920), Ss. 12 and 21 — S. 21 is not inconsistent with common law right of indemnity but gives an added right — Person forging indorsement in his favour to promissory note and in his turn indorsing it in favour of respondent—Respondent getting such note renewed in good faith without being required to furnish security under S. 21 — True holder recovering damages from Government for conversion — Government are entitled to be indemnified under common law right of indemnity :** *38 Bom L R 1025=A I R 1937 Bom 145=168 I C 652, Reversed.*

It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. This principle is of the widest general application. It is often said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled, does not per se debar him from saying that he has acted upon the assertion or claim or request of the applicant. [P 192 C 2; P 193 C 1; P 194 C 1]

Such common law right of indemnity may properly prima facie be implied from request in S. 12. S. 21 does not negatively cut out this liability but gives an added statutory right, which is different from it. Thus, the common law right is required in a case where the officer though satisfied by the applicant when he issues the renewed note of the justice of his claim, is wrongly satisfied. [P 194 C 1, 2]

Where therefore a person forges the indorsement of the true holder to a promissory note in his favour and in his turn indorses it in favour of the respondent, who gets it renewed in good faith without being required to furnish security under S. 21, and the true owner recovers damages from the Government for conversion, the latter are entitled to be indemnified by the respondent under the common law right of indemnity, as the renewal of promissory note at the request of the respondent involves an injury to a third party's right: *(1905) A C 392 and (1875) L R 10 C P 196, Rel. on; 38 Bom L R 1025=A I R 1937 Bom 145 =168 I C 652*, **Reversed.** [P 194 C 2; P 195 C 1]

(c) Interpretation of statutes—Statute changes law only to extent its words require.

A statute is prima facie to be construed as changing the law to no greater extent than its words or necessary intendment require. [P 194 C 2]

H. V. Willink and Sir Thomas Strangman — *for Appellant.*

Sir William Jowitt and C. P. Harvey — *for Respondents.*

Lord Wright.—This is an appeal from a judgment of the High Court in appeal at Bombay, which affirmed a judgment of Wadia J., as trial Judge. These judgments rejected the claim of the appellant to be indemnified by the respondents against a liability which he had incurred and been compelled to satisfy under the circumstances of the case which were shortly as follows. A lady named Gangabai was the indorsee and holder of a Government promissory note for Rs. 5000. A broker named Acharya, having possession of the note on the lady's behalf, forged her indorsement to it in his favour and indorsed it for value to the respondents. The respondents acting in good faith applied to the Public Debt Office under the Indian Securities Act, 1920 to have a renewed promissory note payable to them issued in exchange for the note which the respondents gave up in exchange. The lady, becoming aware of the fraud

practised by Acharya, and the dealing with her note on the part of the respondents and the appellant, which constituted a conversion of her property by either or both as well as by Acharya, sued the appellant in conversion and recovered the appropriate damages. The appellant then brought the present action against the respondents, claiming to be indemnified against the loss thus sustained by him on the principle that the Public Debt Office had issued the renewed note at the request of the respondents and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights. So far as the renewed note was concerned, it was rightly accepted on both sides before their Lordships that it constituted a new contract between the Government and the respondents, which was not affected by the circumstances under which it was issued and certain contentions raised in the Courts below were abandoned by the appellant. Only questions of liability and of principle were argued before their Lordships, matters of amount being left for subsequent settlement if the necessity should arise.

It is convenient first of all to refer to the material sections of the Indian Securities Act, 1920 which having replaced the repealed Act of 1886, dealing with the same matters, now regulates the legal position of these Government promissory notes. Such notes circulate in large numbers in India; hence the importance to the parties and to the Indian public generally of the question of principle involved in this appeal. It appears from the print of the note in question contained in the record, that the note was originally issued in 1854 and payable to a named payee or order. The actual note in question was a renewal note which had been issued in April 1925. On its back spaces had been provided for 10 indorsements. The forged indorsement occupied the fifth space, and Acharya's indorsement to the respondents occupied the sixth space. At the foot of these spaces was a receipt signed by the respondents for a renewed note in lieu of the note. It is clear that the system of renewing notes is largely used in ordinary practice. It is obviously convenient to have a clean note, in addition to the circumstance that in the course of years the spaces available for indorsements become exhausted. And the holder of a renewed note, obtains a new promise from the Government free from any equities or disputes which might have attached to the prior note. S. 16 of the Act provides in terms that a renewed Government promissory note is to be deemed to constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him.

The Act contains express provisions for regulating the issue of renewed notes. In particular, S. 12 provides that subject to the provisions of S. 13, a person claiming to be entitled to a Government promissory note may on applying to the prescribed officer and on satisfying him of the justice of his claim and delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any, obtain from such officer a renewed promissory note payable to him. S. 13 deals with a case where there is a dispute as to the title to one of these notes, and enables the officer to refuse to act save on a judicial decision or on the result of a formal enquiry. S. 21 on which the judgment under appeal was based, provides that notwithstanding anything in certain specified sections, including S. 12, the prescribed officer might in any case arising, (i) issue a renewed security upon the applicant giving the prescribed indemnity against the claims of all persons claiming under the security so renewed, or (ii) refuse to issue a renewed security unless such indemnity is given. Rules have been made under the Act to "prescribe", the indemnity which may be exacted, which is to be a bond of the applicant with two sureties in double the face amount of the note. In the present case the Government officer when issuing the renewed note to the respondents, did not exact a security under S. 21. The question is whether the appellant is debarred from relying on an indemnity implied under the Common law of India which in this respect is identical with that of England. The statement of the principle under which such an indemnity is implied is stated by Lord Halsbury L. C. in (1905) A C 392,[1] to be correctly expressed in a quotation from counsel's argument in (1875) L R 10 C P 196,[2] which runs as follows:

> It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to

1. Sheffield Corporation v. Barclay, (1905) A C 392=74 L J K B 747=93 L T 63=3 L G R 992=12 Manson 248=24 W R 49=21 T L R 642=10 Com Cas 287=69 J P 385.
2. Dugdale v. Lovering, (1875) L R 10 C P 196=44 L J C P 197=32 L T 155=23 W R 391.

the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.

This principle, which in England must now be read in connexion with recent legislation as to contribution between tort-feasors, is of the widest general application. It is often, as in the statement by Lord Davey in the same case, to which reference will shortly be made, said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. But, in the words adopted by Lord Halsbury, it is merely said that the person is entitled to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that request to his damage. Sir William Jowitt has contended that the necessary elements are the assertion and the action taken upon that assertion by the other party. He has contended that neither element is present in the case of the performance of a statutory duty like that in question. There was, he says, no assertion by the respondents but only a claim in respect of which the Government official had to act on his own responsibility and judgment. His conduct, it is said, was not ministerial, but judicial or semi-judicial, since the statute, by S. 21, gave him the right to refuse the renewed note except on the terms of his being granted the prescribed indemnity. Reliance was particularly placed on the form in which the rule was stated by Lord Davey in (1905) A C 392[1] at p. 399, where Lord Davey thus stated the principle :

I am further of opinion that where a person invested with a statutory or Common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it.

It seems that it was on this line of reasoning that Wadia J., decided in favour of the respondents. Beaumont C. J., (with whose judgment Rangnekar J. agreed) was not prepared to accept this reasoning, but preferred to rest his decision upon a different ground which will be explained later in this judgment. Their Lordships are with respect unable to agree with Wadia J. Lord Davey, in their opinion, did not mean, when he used the word "ministerial" to indicate that the act done must be done without any element of choice, deliberation or decision on the part of the doer. All, it seems, that he meant was that the official had no interest except to perform his statutory duty. But the mere performance of that duty may involve some degree of deliberation and judgment. Thus in (1905) A C 392,[1] which dealt with the requesting of transfers of stock in the Corporation's register, the indemnity was implied though S. 30 (1) of the Sheffield Corporation Act of 1883 provided that :

The Corporation or the Registrar before allowing any transfer of stock may, if the circumstances of the case appear to them or him to make it expedient, require evidence of the title of the person claiming a right to make the transfer.

Similarly, in (1906) 2 Ch 47,[3] the Court of appeal were, it seems, prepared to hold that a person who acting in good faith, brought to the Land Registry a transfer apparently executed by the registered proprietor of the piece of land, but in fact a forgery, became subject to a contract implied by law to indemnify the person whose duty under the Land Transfer Acts was to register transfers against any liability resulting from the exercise of the duty. There may indeed be cases where the person charged with the statutory duty is also charged with the responsibility of deciding in a judicial or quasi-judicial capacity whether it is proper to exercise the duty in any particular case, so that he could not be regarded as acting on the applicant's request, but solely on his own statutory responsibility. Such cases which are contemplated as possible in (1906) 2 Ch 47[3] would depend on the particular construction of the particular statutes, but would involve considerations which are different from those presented in (1905) A C 392[1] or (1906) 2 Ch 47.[3] It is on the analogy of these latter authorities that in their Lordships' judgment the present case must be determined. There is nothing

3. A. G. v. Odell, (1906) 2 Ch 47=75 L J Ch 425 =94 L T 659=54 W R 566 = 22 T L R 466.

anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed in the simpler type of case illustrated by (1875) L R 10 C P 196[2] it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request not under complusion but of choice. That does not however deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled, does not per se debar him from saying that he has acted upon the assertion or claim or request of the applicant. In this connection Beaumont C. J. says:

> If he [the prescribed officer] acts upon the request, I doubt if it is relevant to say that he has also considered the matter for himself.

Their Lordships agree in this with the Chief Justice except that they do not prima facie regard it as a matter of doubt. This view is fortified by considering the language of S. 12, which clearly puts the onus on the applicant

> .... a person claiming to be entitled to a Government promissory note may [that is, is entitled]on applying to the prescribed officer and on satisfying him of the justice of the claim and delivering the promissory note receipted in the prescribed manner and paying the prescribed fee, if any,

obtain the renewed note. "Claiming" involves an assertion of title, the act of applying is the applicant's act, "satisfying" is, as Mr. Willink pointed out, in the active not passive and is a condition to be fulfilled by the applicant. These matters clearly, in their Lordships' judgment, constitute a request, from which the common law indemnity may properly be prima facie implied, nonetheless because some deliberation may be involved on the part of the officer before he submits to be satisfied by what the applicant puts before him. But the Chief Justice held that the common law indemnity could not be implied under this Act because of S. 21, which in his judgment excludes any implied indemnity because it gives a right to demand an express indemnity and to refuse to give the renewed note unless an express indemnity is given. He thought that the express provision by S. 21 of the statutory right is inconsistent with the existence of an implied right if the section is not acted upon. He concluded that the Legislature must be deemed to have intended that there should not be a right of indemnity in every case, but only under the special conditions of S. 21. Their Lordships are, with respect, unable to accept this view. As a matter of construction, they do not accept the view that S. 21 has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity undoubtedly, in their judgment, existing under the Act of 1886, which embodied the law on this matter until it was repealed and replaced by the Act of 1920. A statute is prima facie to be construed as changing the law to no greater extent than its words or necessary intendment require. S. 21 was not in the Act of 1886. If it had been intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act, the Legislature would, it seems, have used words clearly expressing that intention, so as to secure that, save as provided by S. 21, there should be no right of indemnity.

Their Lordships see no reason to justify reading in or implying such words. On the contrary they construe S. 21 as giving an added statutory right, which is different from and in no way inconsistent with the common law right. That latter right is not complete merely because the officer has acted upon the request; to make it effective it is necessary that a further condition should be fulfilled namely that in the words used in (1875) L R 10 C P 196,[3] that "the act should turn out to be injurious to the rights of a third party." Thus the common law right is required in a case where the officer, though satisfied by the applicant when he issues the renewed note of the justice of his claim, is wrongly satisfied. Though both he and the applicant were acting in perfect good faith and without suspicion, they may be, as they were in this case, unconsciously infringing the rights of the true owner of the note and guilty of converting it. Cases in which the common law implies the indemnity are generally cases when the officer would not have thought of demanding an indemnity under S. 21. These are mostly, if not always, cases where the risk is due to the fraud of some other person. S. 21, if construed as it is by the Chief Justice, would

put the burden of this risk on the Government, unless in every case the officer exacted the statutory indemnity under Section 21. This however would place a serious and unnecessary burden on the course of renewing these notes, which is a practice in constant use and to be facilitated, not obstructed. On the construction which their Lordships think is, merely as a matter of construction correct, the common law indemnity would be operative in the cases, presumably rare on the average, where it turns out eventually to be wanted because of some concealed fraud. On the other hand, the officer would generally exercise the right to require the express indemnity before issuing the renewed note, wherever he can say that he is satisfied, but still he is conscious that there are circumstances of doubt or otherwise which lead him to refuse to issue the renewed note without the express indemnity. It may be noted that under S. 21 what can be demanded as a condition of issuing the renewed note is the "prescribed" indemnity which under the rules prescribed under the statute is to be the bond of the applicant with two sureties for twice the amount of the note. This is obviously different from the common law indemnity. It may further be observed that if the matter were to be decided on the basis of the equities between the parties, the loss would more properly, it seems, be borne by the respondents, who have thought fit in the course of their business which they carry on for profit, to purchase the note from Acharya on the forged indorsement and have assumed the responsibility of putting forward the note as being their own property, whereas the Government officer has merely performed his statutory duty in a ministerial capacity on the claim and assertion of the respondents. There is, in their Lordships' judgment, every reason why the Court should imply an indemnity in this case and no sufficient reason why they should treat S. 21 as excluding that implication. It is no doubt true that if an express indemnity were exacted under Section 21 it would exclude any implied or tacit indemnity. But that is a different matter from construing S. 21 as removing from the scope of the statute the possibility in a proper case of the implied indemnity where no express indemnity has been required.

For all these reasons, their Lordships are of opinion that the appeal should succeed, that the judgments of the Courts below should be set aside and that it should be adjudged that the appellant recover from the respondents the proper amount under his claim and should also have the costs of this appeal and his costs in the Courts below. If the parties can agree what is the proper amount it can be inserted in the Order in Council; if they cannot agree, the case must be remitted to the High Court at Bombay to assess the amount. They will humbly so advise His Majesty.

V.B.B./R.K. *Appeal allowed.*

Solicitors for Appellant —
Solicitor, India office.

Solicitors for Respondents —
Ey. Turner & Sons.

A. I. R. 1938 Privy Council 195

(From Lahore)

3rd May 1938

LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN

Pandit Parma Nand — Appellant.

v.

Nihal Chand and another —
Respondents.

Privy Council Appeal No. 12 of 1937.

(a) Hindu Law — Religious endowment — Mahant — Descent of property from guru to chela—Property acquired by mahant can be of secular nature—'Udasi' order—Connexion with natural family severed—Even private property acquired by mahant descends to chela — Descent to chela does not warrant its nature as religious.

The fact that properties have descended from guru (religious preceptor) to chela (religious disciple) does not necessarily lead to the conclusion that a property, when acquired by a mahant, loses its secular character and partakes of religious character. When a person enters the Udasi order, he severs his connexion with the members of his natural family. It follows that neither he nor his natural relative can succeed to the property held by the other. There is however no reason for holding that an Udasi cannot acquire private property with his own money or by his own exertions. If he does acquire private property it cannot be inherited by his natural relatives, but passes on his death to his spiritual heir including his chela who is recognized as his spiritual son. The descent of the property from a guru to his chela does not warrant the presumption that it is religious property. [P 196 C 2; P 197 C 1]

(b) Trust—Public — Essentials.

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author or authors of the trust must be

ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required: *A I R 1935 P C 97, Rel. on.* [P 198 C 1]

D. N. Pritt and C. Sidney Smith — *for Appellant.*

A. M. Dunne and W. Wallach — *for Respondents.*

Sir Shadi Lal.—In the town of Gujranwala, there is a building variously described as Baghichi Thakaran or Gurdwara Baghichi, and the main issue, which their Lordships have to determine in this appeal, is whether that building, together with the shops and other property attached to it, is the subject-matter of a trust for a public purpose of a charitable cr religious nature. The issue was raised by the defendants who, claiming to be the representatives of the Hindu public, made an application to the District Judge under S. 3, Charitable and Religious Trusts Act (No. 14 of 1920), alleging that the Baghichi Thakaran was a public endowment for religious and charitable purposes, and called upon Mahant Narain Das, who was described by them as the trustee of the endowment, to furnish details of the nature and purposes of the trust, and of the value of the property belonging to the trust, and also to render an account of the income and expenditure of the trust property. Their allegations were contested by Narain Das, and the controversy between the parties led to the present action brought by Narain Das for the purpose of obtaining an authoritative pronouncement upon the nature of the trust and of the property attached to it. The trial Judge found against the public character of the alleged trust ; but his judgment has been reversed by the High Court of Judicature at Lahore. From the judgment pronounced by the High Court and the decree which followed upon it, this appeal has been brought to His Majesty in Council by Pandit Parma Nand who, on the death of Narain Das, was impleaded as his legal representative.

The learned Judges of the High Court, after a careful consideration of the question of onus, have endorsed the conclusion of the trial Judge that it was for the defendants to prove that the plaintiff, who was admittedly in possession of the property, held it on a trust created for public purposes of charitable and religious nature. The history of the Baghichi Thakaran or Gurdwara Baghichi may be briefly stated. The Baghichi was founded by one Baba Kulla or Kuljas who died about 1800 A. D. He was a Khatri by caste, and migrated from a place called Saidnagar to Gujranwala, where he took up a plot of land and built a house thereon. He also planted a garden, which was the origin of the name Baghichi (orchard) usually applied to this institution. Baba Kulla was succeeded by his chela, Thakar Ram Das who was an Arora by caste. It is stated that Ram Das practised as a physician, and that while he was in charge of the Baghichi Thakaran he made improvements to the building. It was however Ram Das's successor, Sant Das, who made considerable extensions and also acquired house and shop property at Gujranwala. The prosperity of the institution was mainly due to Narain Das who succeeded Sant Das on his death in 1879. Narain Das acquired properties at Nankana Sahib, and also built shops at Gujranwala. The annual income of the various properties during the time of Narain Das rose from Rs. 1394 in 1905 to Rs. 7664 in 1923. It was probably this abnormal rise in the income which attracted the attention of the respondents who made the application under the Charitable and Religious Trusts Act which led to this litigation. It appears that the person, who happened to be in charge of the Baghichi, was called mahant; and that the Baghichi itself was known as Gurdwara. But the main property, which is the subject-matter of the dispute, was acquired by the person or persons who occupied the office of mahant.

The principal ground, upon which the judgment of the High Court proceeds, is that the Baghichi and other properties have descended from guru (religious preceptor) to chela (religious disciple) ; but this circumstance does not necessarily lead to the conclusion that a property, when acquired by a mahant, loses its secular character and partakes of religious character. It is common ground that the mahants of this institution belonged to an ascetic order called Udasi. The Udasis rarely marry ; and, if they do so, generally lose all influence ; for the dharamsala or Gurdwara soon becomes a private residence closed to strangers : Maclagan's Census Report for the Punjab, Part 1, Chap. 4, p. 152. When a person enters the Udasi order, he severs his connexion with the members of his natural family. It follows that neither he nor his natural relative can succeed to the

property held by the other. There is however no reason for holding that an Udasi cannot acquire private property with his own money or by his own exertions. If he does acquire private property, it cannot be inherited by his natural relatives, but passes on his death to his spiritual heir including his chela who is recognized as his spiritual son. The descent of the property from a guru to his chela does not warrant the presumption that it is religious property.

Assuming, however, that the property acquired by a mahant is to be treated as a religious property, the question arises whether it was dedicated for the use or benefit of the public. In the case of a public trust, the beneficiaries are either the public at large or a considerable portion of it answering a particular description. Now, there is no documentary or oral evidence to show that the property was expressly dedicated for the use or the benefit of the public. Are there any circumstances from which the dedication of the property to a public trust can be implied? It appears that in 1869 four persons applied to the Municipal Committee, Gujranwala, that a plot of land lying in front of the building of the Baghichi Thakaran might be included in the courtyard of the building, and that, though they were themselves interested in the land as muafidars, they would not demand any compensation for surrendering their rights to the property. The Municipal Committee recommended the grant of land, and the Deputy Commissioner considered the land to be an unsightly plot adjoining the public road, and was induced to remit the share of the price of the land which was due to the Government "in the interest of the city". It is true that the building was then described as a holy place and the mahant occupying it was stated to be a "very good man"; but as pointed out by the High Court,

> the transaction itself seems to have had a town planning motive rather than to have been prompted by a desire to endow the Gurdwara.

This assignment of land does not prove that the building was dedicated to a public trust. It is, however, argued that income-tax was sought to be imposed upon Narain Das for the year 1905-06 in respect of the income derived by him from the property of the Gurdwara, and that the income-tax was then remitted on the ground that the property constituted a public trust. There is no document to show the nature of the objection on which the order of remission was based. The oral evidence is to the effect that the tax was remitted because the property was stated to be wakf; but the expression "wakf" is vague and may include a private trust. It cannot, therefore, be said that the mahant at that time declared the property to be dedicated to a religious trust of a public nature. It is, however, significant that, as deposed by him, Narain Das did not succeed in securing an exemption from income-tax on a subsequent occasion, and had to pay Rs. 250 or Rs. 300 per annum as income-tax. Their Lordships' attention has been invited to a will made by Mahant Sant Das on 14th October 1875. In this will the testator describes the property in dispute as his private property, and states that he is entitled to alienate it. There can be no doubt that Sant Das regarded the property to be his property, but the respondents contend that he himself declared the property to be a public trust to take effect after his death, and appointed a managing committee to administer the alleged trust. The original will is not available, but it is common ground that the will was not acted upon after the death of the testator. There is some evidence to show that the testator revoked it by destroying it. The revocation would make the declaration of trust infructuous. Be that as it may, there can be no doubt that neither Narain Das, who succeeded Sant Das, nor any managing committee administered the property as trust property. The will, whether revoked or not, cannot be relied upon to prove that a public trust came into operation after Sant Das's death. It however shows that he regarded himself to be the owner of the property and claimed the right to alienate it. This claim negatives the suggestion that it came into his hands as property dedicated to public trust. Indeed, there is ample documentary evidence to show that alienations of several properties were made by various mahants in exercise of their right of ownership.

The plaintiff Narain Das himself made a will on 9th July 1922, and gifted the property to the appellant, Parma Nand, as his successor ; and described himself to be the absolute owner of the Baghichi and all other property. But this declaration cannot be used for determining the point in controversy between the parties. It appears that holy scriptures were recited in the Gurdwara on various occasions, and that presents were made by the audience to

the person or persons who made the recitations. But it is clear that recitations were suspended for several months. The recitations of holy books are, in no way, incompatible with the hypothesis that the trust, if any, was of a private nature. There can be no doubt that even in a private shrine, the public may worship, but the question is whether they do so without any permission, leave or license and as of right. This test has not been satisfied in the present case. Their Lordships do not think that any user or treatment of the property has been proved, such as would justify the conclusion that it was a public, and not a private trust. It cannot be disputed that the plaintiff can be defeated only if the defendants establish affirmatively that a trust of a public character was imposed upon the property. To constitute a trust " created or existing for a public purpose of a charitable or religious nature ", within the meaning of Act 14 of 1920, the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required : 62 I A 146.[1] These conditions have not been fulfilled. Their Lordships are of the opinion that the onus, which rested upon the defendants, has not been discharged. They will therefore humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be discharged, and that the decree of the Court of first instance be restored. The appellant must have his costs here, as well as in the Courts below.

B.D./R.K. *Appeal allowed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
T. L. Wilson & Co.

1. Chhotabhai v. Jnan Chandra Basak, (1935) 22 A I R P C 97=155 I C 409=57 All 330= 62 I A 146 (P C).

*** * A. I. R. 1938 Privy Council 198**

(From Rangoon)

3rd May 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Rowland Ady and others — Appellants.

v.

Administrator - General of Burma, Administrator to the estate of Hosain Hamadanee — Respondent.

Privy Council No. 62 of 1937.

*** * Evidence Act (1872), S. 92, Proviso 3— Promissory note payable on demand—Collateral oral agreement not to make demand until certain condition is fulfilled comes under Proviso 3 of S. 92.**

It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. [P 202 C 1]

Where the promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of S. 92 : *(1898) 2 Q B 487 ; (1817) 8 Taunt 92 and 25 Cal 401, Disting.; A I R 1925 Cal 1007, Approved.* [P 202 C 1]

A. M. Dunne and A Pennell — *for Appellants.*

R. F. Roxburgh and Malore — *for Respondent.*

Lord Wright. — The question in this appeal relates to a promissory note executed by the appellants dated 12th September 1933. This note was a renewal of an earlier promissory note executed in 1930, but as it is common ground that the considerations which would have applied to the original note, applied to the renewal, no distinction need be drawn between the two documents. The question to be determined is, what were the conditions on which the earlier promissory note was executed. The appeal is by Rowland Ady, who will be referred to as the appellant, Rowland Ady & Co. being merely the firm name under which he carries on business so that it may be disregarded in this appeal. The respondent, the Administrator-General of Burma, is the administrator of the estate of one Hosain Hamadanee, deceased. In

1927 the appellant, Hamadanee and one James Cyril Ashe, who was a mining engineer, formed a syndicate to operate certain mining rights, here referred to as Booth's Grant, for the purpose of dealing with these rights. Shortly afterwards on 7th October 1927, the syndicate registered a limited liability company under the name of Ashe's Minerals, Limited, and under an agreement of the same date agreed to transfer all their assets to the company in consideration of Rs. 18,000 to be satisfied by the allotment to Hamadanee, the appellant, and Ashe of 600 shares each. These shares were duly allotted. The necessary finance was advanced by Hamadanee on the footing that he and the appellant were each to bear half the expenses and that they and Ashe were each to receive one-third of the profits. Hamadanee put up approximately Rs. 30,000. In addition to Booth's Grant, the company also acquired other properties, one of which was a bamboo reserve.

On Hamadanee's death in April 1928, the respondent, the Administrator-General of Burma, who was then Mr. Hormasji, was appointed administrator of the estate and so continued at all material times. In the course of administering the estate, the respondent got into touch with the appellant and in his endeavours to settle up the complicated affairs of Hamadanee, discussed by conversation and correspondence the transactions in connexion with Ash's Minerals, Ltd., which was one of the numerous matters to be liquidated. That company had, shortly after Hamadanee's death, realized a profit and had distributed the proceeds by way of dividend. In the course of the discussions between the appellant and respondent, the state of the accounts in respect of Ashe's Minerals, Ltd., was examined and as a result of an interview between these two parties a statement was prepared which showed a balance due by the appellant to the respondent as administrator of the estate amounting to Rs. 13,608-6-9. There are certain other items which it is not necessary to consider. The account was signed by an official in the respondent's office called Natarajan. At the foot of the account, there was a note signed by the appellant in the following terms :

This account is correct and I am willing to execute a pro-note for Rs. 13,608-6-9 on condition that payment is not demanded until, as originally arranged, Booth's Grant deal goes through when the amount is to be paid by me without interest. This account excludes the item of 1500 due to me as half share in the marble quarries and 2000 paid by me as H. H.'s share of Government rent for same, also 150 due to the estate by me for cows. These matters to be settled later on as soon as proofs are adduced in support of my claim.

Under the appellant's signature there appears the date 17th September 1930. Under Natarajan's signature there was inserted the date 18th September 1930 but it has now been agreed that that had been originally 17th September 1930 and that the 17th was altered to the 18th. It has not been explained when, how or why this alteration was made. The next documents to be considered consist of a letter dated 20th September 1930, sent by the respondent to the appellant, and two documents which it enclosed. The letter requested the appellant to execute two promissory notes, one for Rs. 13,608-6-9 and one for Rs. 150. The latter promissory note may here be disregarded because it relates to the purchase of a cow or cows. The appellant was also requested to have the former promissory note signed by his firm. The two documents enclosed were described as being (1) an office report of the respondent's dated 18th September 1930, of the balance due from Rowland Ady & Co., Ashe and Ashe's Minerals Limited, and (2) the statement of accounts showing the balance due from Messrs. Rowland Ady & Co., Ashe and Ashe's Minerals, Ltd. That has been taken to be the account already referred to, but it is not clear whether this document included not only the account itself but also the endorsement made and signed by the appellant to which reference has been made. The document No. 1 is a copy of part of the actual office report which had been prepared and initialled by Natarajan. The greater part of this report deals with figures of account. It recites that the appellant was claiming that there should be certain adjustments in his favour and states that when he produced papers in support of his claim and the office was satisfied with the claim, the necessary credit would be given. But the report next contains a passage which is most material to the decision of this case in the following terms :

In the meanwhile he has agreed to execute a P. N. for the sum of Rs. 13,608-6-9 found due from him on condition that the money is not demanded till he receives the next distribution from Ashe Minerals Ltd. and that no interest is demanded. He will execute the pro-note tomorrow if A. G. approves of the account. He has already seen it and has signed at foot of the account.

Against this passage on the original office report there was a note in red pencil, "Appd.—let him sign on above terms." This note was made by the respondent and is initialled by him under the date 18'9. The remainder of the office report consists of details of the account and there is a further note in red pencil made by the respondent, "Appd. I remember the transaction. Mr. Ady's statement to be accepted." Initialled "J. H." 18'9. There was also on the document a note initialled by Natarajan that a separate P. N. for Rs. 150 was taken from the appellant. What was described as the office report in the letter of 20th September 1930, to the appellant was a copy of the actual report excluding the red pencil notes made by the respondent and also the note about the separate promissory note for Rs. 150, and also excluding the statement of account appended. On receipt of these documents the appellant executed the original promissory note in his own name and in his firm's name. The note was in the following terms :

> On demand we, Rowland Ady and Rowland Ady & Co., of No. 55 Mogul Street, Rangoon, jointly and severally promise to pay to the Administrator-General of Burma and administrator to the estate of Hoosain Hamadanee the sum of Rs. 13,608-6-9 being the amount due by us and by Mr. Ashe to the estate of Hoosain Hamadanee, deceased.

The action was brought on the renewal of this promissory note. The claim was resisted and the defence set out in the written statement was as in the following terms :

> The said promissory notes [that is to say, the original and the renewal], were executed subject to the condition precedent that no liability was to attach thereto until the defendants received the next distribution from Ashe's Minerals Ltd., and until certain adjustments of account in the defendants' favour had been made to the extent of Rs. 3350.

By an amendment the word "unless" was substituted for the word "until" in both places where it occurred. The trial Judge stated that he accepted the appellant's account and was satisfied that to the best of his ability he endeavoured to assist the Court by telling the truth as he understood it. The Judge held that the promissory note was made subject to the account of 17th September 1930, and the endorsements thereon signed by the appellant, and that the condition of the sale or disposal of the Booth's Grant had been fulfilled or at least that the appellant had failed to prove that it had not been satisfied. He accordingly made a decree against the appellants for Rs. 13,608-6-9 less such sum, if any, as might be found upon taking the account of the subject-matters referred to in the appellant's endorsement of 17th September 1930. This decree, subject to a variation, now immaterial, was affirmed by the High Court on appeal, and the appeal was dismissed with costs.

It is however most unfortunate that the High Court on appeal in arriving at that conclusion fell into a curious misconception of fact because they dismissed from their consideration the copy of the office report which, as already stated was enclosed in the said letter of 20th September 1930. They held that the appellant or his legal advisers had concocted their defence from material improperly obtained from the inspection of the documents. They appear to have been of opinion that the copy of the office report had been improperly made by the appellant or his legal advisers on the inspection of documents during the action and had then been put forward as a relevant document. The respondent's counsel has most properly disclaimed any reliance on this view of the Appellate Court. Their Lordships have seen the original letter of 20th September 1930, and the actual enclosures and have set out above what happened. There is no ground whatever for imputing any impropriety to the appellant or his legal advisers ; any such imputation has been unreservedly withdrawn before their Lordships on this appeal. The Appellate Court may perhaps have been confused by the fact that the appellant's legal adviser or his clerk in comparing the copy of the office report sent with the letter of 20th September 1930, had written the various notes which appeared, as have already been explained, upon the office report itself and were naturally not reproduced in the copy sent to the appellant. The unfortunate result of this misconception on the appeal to the Appellate Court is that their Lordships have not got the benefit of the judgment which the High Court on appeal would have arrived at if they had not fallen into this misconception.

In their Lordships' opinion this appeal ought to be decided on the written documents referred to above, but in view of the arguments addressed to them, they think it desirable that they should also discuss the oral evidence. There were two witnesses of importance, the appellant, himself

and the respondent, Mr. Hormasji. Their evidence deals with the circumstances when the promissory note was executed. The appellant deposed that he had several interviews with Hormasji in which the accounts were discussed. He stated that the statement of account on which he wrote his endorsement was the result of one of these interviews and that it was decided at that interview that no demand should be made on the note until Booth's Grant deal went through and the proceeds were derived from the company; but he said that that arrangement was altered at the suggestion of Mr. Hormasji who on the next day sent an altered form of wording to the effect that no demand would be made on the note and no liability would attach until the assets of Ashe's Minerals were next distributed. The appellant said that he agreed to the change and asked for an agreement to be sent and that on the following day he was sent a copy of the office report. The respondent is not so clear in his evidence but eventually, according to the Judge's note he said, "I agree to what is written down on page 2 of Ex. 'C' and against which I have written down the word Appd." He is there referring to the passage quoted above from the office report. He further said that in his mind there was no difference between the two forms of the condition and that he had agreed not to make a demand on the pro-note until one of these conditions was fulfilled. Natarajan's evidence is not of importance.

Taking the position as a whole, their Lordships are of opinion that the documents enclosed in the letter of 20th September 1930, were intended to embody the conditions under which the appellant was to execute the promissory note and they are of opinion that these conditions were substituted for the conditions contained in the endorsement which the appellant added to the statement of account and signed on 17th September 1930. The appellant, by executing the promissory note on the basis of the letter and enclosures of 20th September 1930, accepted these conditions so proposed by the respondent. Accordingly the complete transaction between the parties was embodied in these documents, namely the promissory note on the one hand containing the promise to pay and on the other hand the conditions embodied in the letter of 20th September 1930, and its enclosures. The result of that position is that the respondent is not entitled to demand payment of the promissory note until the next distribution from Ashe's Minerals, Ltd. As this has not yet taken place, the action based on the promissory note was premature and cannot succeed on the present state of affairs since there had been no next distribution from Ashe's Minerals, Ltd. when the action was started, that is no distribution of profits subsequent to that referred to above before the date of the agreement. If, as it is suggested may happen, there never is any such distribution it will follow that no demand for payment can ever be made on the promissory note. That latter point is, however, immaterial in these proceedings.

Mr. Roxburgh in his able argument for the respondent did not seriously contest that if this view of the documents was taken, that is to say, if their Lordships were of opinion that the letter of 20th September with its enclosures constituted a written offer from the respondent to the appellant, capable of being accepted and, in fact, accepted by the appellant, by the execution of the promissory note, it would follow that the terms of the promissory note must be read along with and as qualified by the written agreement on the part of the respondent not to demand payment until the condition was fulfilled. He however strongly contended that that was not the true view and that the letter with its enclosures constituted merely a record of what was in truth before the date of the documents an oral agreement arrived at between the parties and that evidence of such an oral agreement was not admissible by reason of S. 92, Evidence Act. Against this it was contended on behalf of the appellant that even if the agreement not to demand payment was merely a collateral oral agreement, it was still admissible in evidence as falling within Proviso 3 of S. 92 which provides that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any written contract, grant or disposition of property may be proved.

Their Lordships, as already stated, are of opinion that the accompanying or collateral agreement which was the condition of the execution of the promissory note was a written agreement and therefore outside S. 92. But even if the collateral agreement was an oral agreement so as to come within S. 92, they are of opinion that it would fall within Proviso 3 of the section which

states the Indian law in terms which are in accordance with English law. It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. In their Lordships' judgment this collateral agreement comes under the latter description and is within the proviso. As an illustration for example, reference may be made to (1898) 2 Q B 487,[1] where it was sought to prove an oral agreement to renew a promissory note payable at three months date, and that was held to be an agreement altering the terms of the written contract. In the earlier case in 8 Taunt 92[2] the evidence which was excluded was of a parol agreement said to have been made at the time of making a note. The note was expressed to be payable eight months after the date. The evidence which was rejected was that payment should not be demanded until after the sale of certain assets.

The present case falls into the other category. The promissory note is, by its express terms, payable on demand, that is at once. The obligation under the note attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso 3 of S. 92. A case like the present is to be distinguished from that dealt with in 25 Cal 401[3] in which the promissory note, though absolute in its terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. Sale J., in rejecting this evidence expressed his opinion that the proper meaning of Proviso 3 was that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. This description in their Lordships' judgment applies to the present case. To the same effect Page J., in 52 Cal 677[4] held that the collateral agreement alleged in that case constituted a condition precedent to the attachment of any obligation under the cheques in question so that they remained inoperative until the condition was fulfilled. The same view has been applied in other cases, which it is not necessary here to cite specifically.

In their Lordships' judgment if the collateral agreement in the present case were held to be an oral agreement, evidence of it would be admissible on the principles they have stated but they prefer to decide the case on the ground that the actual position of the parties depends on the written documents, namely the promissory note and the letter and enclosures of 20th September 1930, and that accordingly no question of admissibility of evidence under S. 92 arises. For these reasons, with all respect to the Courts below, their Lordships are unable to agree with them in the conclusions at which they have arrived; they are of opinion that the appeal should succeed; that the decrees appealed from should be set aside and that judgment should be entered for the appellants with costs before this Board and in the Courts below. They will humbly so advise His Majesty.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellants —
J. E. Lambert.

Solicitors for Respondent —
Burton, Yeates & Hart.

1. New London Credit Syndicate, Ltd. v. Neale, (1898) 2 Q B 487=67 L J Q B 825=79 L T 323.
2. Free v. Howkins, (1817) 1 Moore 535=8 Taunt 92=129 E R 317.
3. Ramjibun Serowgy v. Aghore Nath Chatterjee, (1898) 25 Cal 401=2 C W N 188.
4. Walter Mitchell v. A. K. Tennent, (1925) 12 A I R Cal 1007=90 I C 59=52 Cal 677.

A. I. R. 1938 Privy Council 202

(From Lahore)

3rd May 1938

LORD THANKERTON, LORD WRIGHT AND SIR SHADI LAL

Sain Maule Shah — Appellant.

v.

Ghane Shah and others — Respondents.

Privy Council Appeal No. 14 of 1932.

(a) Mahomedan Law—Religious endowment —Takia and sajjadanashin explained.

A takia is a place where a fakir or dervish (a person who abjures the world and becomes an humble servitor of God) resides, before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement. A takia is recognized by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose. The sajjadanashin (literally meaning a person who sits on the sajjada or prayer mat) is the spiritual preceptor of a religious institution. He has the privilege of imparting to his disciples spiritual knowledge. He has charge of the spiritual affairs of a religious institution, while mutwalli has charge of its temporal affairs. In some cases the office of sajjadanashin and the office of the mutwalli are combined in one and the same person. The succession to the office of the sajjadanashin depends on the rules, if any, made by the founder : *20 Cal 810, Rel. on.* [P 203 C 2]

(b) Mahomedan Law—Religious endowment — Takia Shah Shuhada of Madari fakirs at Ludhiana in Punjab—*M* held was duly elected by the bhek to the office of sajjadanashin.

Election by the bhek or religious fraternity is the rule followed for appointing the sajjadanashin of the takia Shah Shuhada at Ludhiana. The usage governing the election of a sajjadanashin does not provide a special procedure for conducting the election. There is no such thing as secret voting in the community consisting of Madari fakirs and there can be little doubt that what is contemplated by the usage is that the view of the fraternity should be ascertained as to who would be regarded by them as a suitable person to discharge the functions of the sajjadanashin. [P 203 C 2 ; P 204 C 2]

One *M*, accompanied by two other fakirs, approached *S*, the head of the shrine of Madari fakirs at Makanpur, and asked him to attend an assembly of Madari fakirs and other persons at Ludhiana. *S* acceded to his request, and arrived at Ludhiana. A document or agreement in writing was submitted to him by the fakirs assembled at Ludhiana, requesting him to appoint a successor to the deceased sajjadanashin. The signatories declared that the office of the gaddinashin (sajjadanashin) had been vacant and unanimously requested *S* to confer the office on "anyone who was fit and whom he deemed fit" for the office of the sajjadanashin of the takia. In compliance with this request *S* granted on that day a sanad selecting *M*, a "disciple of *J*" for the office of the sajjadanashin of the shrine. This sanad also was signed by the representatives of various shrines and other Madari fakirs :

Held that *M* was duly elected by the bhek to the office of the sajjadanashin. [P 205 C 1]

J. P. Eddy and V. Krishna Menon — *for Appellant.*

A. M. Dunne and J. M. Parikh — *for Respondents.*

Sir Shadi Lal. — The question raised by this appeal relates to the appointment of a sajjadanashin of a Moslem shrine situate at Ludhiana in the Province of the Punjab. The shrine is known as takia Shah Shuhada, and belongs to a sect of ascetics called Madari fakirs. The sajjadanashin of the shrine was one Sain Jhandu Shah, who died on 25th October 1922. The matter in controversy between the parties is whether the appellant Maule Shah was validly appointed to succeed Sain Jhandu Shah in the office of the sajjadanashin of this institution. A takia is a place where a fakir or dervish (a person who abjures the world and becomes an humble servitor of God) resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement: 20 Cal 810[1] at p. 822. A takia is recognized by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose. The sajjadanashin (literally meaning a person who sits on the sajjada or prayer mat) is the spiritual preceptor of a religious institution. He has the privilege of imparting to his disciples spiritual knowledge. He has charge of the spiritual affairs of a religious institution, while the mutwalli has charge of its temporal affairs. In some cases the office of sajjadanashin and the office of the mutwalli are combined in one and the same person. The succession to the office of the sajjadanashin depends on the rules, if any, made by the founder. But there are no such rules applicable to the shrine in question, and the succession is regulated by the usage which governs the institution. Now, there is ample evidence, and, indeed, the parties are agreed, that election by the bhek or religious fraternity is the rule followed for appointing the sajjadanashin of the takia in question. Whether, in addition to election, there should be a nomination, or confirmation by the head of a superior shrine, is a matter upon which the parties are not unanimous.

The shrine in question belongs, as already stated, to Madari fakirs, an order of fakirs which was founded by Zinda Shah Madhaar of Syria, whose shrine is situate at Mukrampur or Makanpur, about 30 miles from Cawnpore in India. It appears that, on 8th April 1925, the appellant Maule Shah, accompanied by two other fakirs, approached Sayed Nazir Ahmad, the head of the shrine at Makanpur, and asked him to attend an assembly of Madari fakirs and other persons at Ludhiana. Sayad Nazir

1. Mohiuddin v. Sayiduddin, (1893) 20 Cal 810.

Ahmad acceded to his request, and arrived at Ludhiana on or before 18th July 1925. On that day a document or agreement in writing was submitted to him by the fakirs assembled at Ludhiana, requesting him to appoint a successor to Jhandu Shah. It is to be observed that this document was signed, not only by a large number of fakirs and the heads of Madari shrines of the neighbourhood, but also by the respondent Sardar Ali Shah. The signatories declared that the office of the gaddinashin (sajjadanashin) had been vacant since the demise of Jhandu Shah, and unanimously requested Sayad Nazir Ahmad to confer the office on "anyone who is fit and whom he deems fit" for the office of the sajjadanashin of the takia. In compliance with this request, Sayad Nazir Ahmad granted, on that day, a sanad selecting Maule Shah, a "disciple of Jhandu Shah" for the office of the sajjadanashin of the shrine. This sanad also was signed by the representatives of various shrines and other Madari fakirs.

There is evidence to show that Sayad Nazir Ahmad himself tied a turban on the head of Maule Shah in the presence of the assemblage, and other persons, who attended the gathering, offered turbans and presents in cash to him in token of accepting him to be the head of the shrine. Their names are mentioned in a list, with the presents made by them. Maule Shah, on his part, entertained all of them at a feast which cost him about Rs. 3000. The trial Judge holds that the evidence, both oral and documentary, produced by the plaintiff in support of his claim, proves that he had complied with the usage regulating the succession to the office of the sajjadanashin, and the learned Judge has accordingly granted a decree to him. From this decree Ghane Shah, who claimed to be the mutwalli of the shrine appointed by Sardar Ali Shah, brought an appeal to the High Court. The appeal was accepted by that Court on the ground that the proceedings taken by Maule Shah for his election cannot be regarded as an election "in which the electors exercised a free and independent choice of a successor to the deceased sajjadanashin."

The learned Judges of the High Court criticised the method employed by Maule Shah in first "obtaining the good will and support of Sayad Nazir Ahmad," and "the unauthorised delegation to him of their powers by a certain section of the fraternity." They expressed the view that the result was, in the circumstances, a foregone conclusion.

Their Lordships are unable to concur in the conclusion reached by the learned Judges. Sayad Nazir Ahmad was admittedly the head of the shrine of the founder of the order of Madari fakirs, and he was held in high esteem by the members of the bhek or the religious fraternity of the takia. The plaintiff was therefore justified in finding out whether his election would meet with the approval of the head of the parent shrine, whose consent is regarded by some witnesses to be essential to a proper election. Be that as it may, it is clear that when he arrived at Ludhiana, he adopted the proper attitude and did not take action until he was requested by all the persons interested in the matter. It cannot be said that the members of the bhek were coerced or unduly influenced in making their choice. Indeed, it is not suggested that the usage governing the election of a sajjadanashin provides a special procedure for conducting the election. There is no such thing as secret voting in the community consisting of these fakirs, and there can be little doubt that what is contemplated by the usage is that the view of the fraternity should be ascertained as to who would be regarded by them as a suitable person to discharge the functions of the sajjadanashin. It is obvious that a proposal should be made by a member of the Madari fraternity, and it was only natural that the members of the bhek should make a request to the head of the most important Madari shrine to give them a lead in the matter. Their Lordships think that the validity of the election in this case cannot be impugned on any reasonable ground. It must therefore be held that Maule Shah was duly elected by the bhek to the office of the sajjadanashin.

It is however argued that he was not a disciple of Jhandu Shah, but there is sufficient evidence to refute this contention. It is significant that he is described as a disciple of the late sajjadanashin in the sanad granted to him by Sayad Nazir Ahmad, and this document is signed by a large number of fakirs. Moreover, Sayad Nazir Ahmad deposes that he himself made inquiries as to the status of Maule Shah, and was satisfied that he was a disciple of the deceased sajjadanashin. The respondent Sardar Ali Shah however claims that he was selected sajjadanashin by the bhek on 28th October 1922, the third day after the death of Jhandu Shah. There can be no

doubt that, if he was validly elected in October 1922, there was no vacancy in the office of the sajjadanashin which could be filled by the subsequent election of Maule Shah in July 1925. The question is whether there was a previous election of Sardar Ali Shah, which rendered the subsequent election of the appellant inoperative. It is said that a document was executed in favour of Sardar Ali Shah on the date of the alleged election, but that document has not been produced. It is not disputed that the contents of the document cannot be proved by oral evidence. There is therefore no proof that the election, if any, was held by the bhek in accordance with the usage of the institution. Indeed, the agreement, executed on 18th July 1925, by the heads of the various shrines and other Madari fakirs requesting Sayad Nazir Ahmad to confer the office of the sajjadanashin on a fit person, states in clear terms that the office of the sajjadanashin of the takia in question has been vacant since the death of Jhandu Shah, and contains a request that the office should be conferred upon a suitable person. The agreement bears the signature of Sardar Ali Shah himself, and it is idle to suggest that he was induced by fraud to sign the document. This plea runs counter to the evidence of Sayad Nazir Ahmad in whose presence the document was signed by Sardar Ali Shah and other Madari fakirs. The objection on the ground of a prior election of Sardar Ali Shah cannot therefore be sustained.

It is not clear whether the usage followed by the institution prescribes that the sajjadanashin-elect should be approved by the head of a superior shrine, but their Lordships do not consider it necessary to discuss the matter, because it is common ground that the appellant's succession to the deceased sajjadanashin received the approval of the head of the shrine, which is recognised by the Madari fakirs as superior to all other Madari shrines in the country. Upon an examination of all the relevant circumstances their Lordships are of opinion that the appellant Maule Shah has established that he was duly elected to the office of the sajjadanashin of the takia Shah Shuhada. The result is that the appeal preferred by him should be allowed, the decree of the High Court be discharged, and that pronounced by the trial Judge be restored. Respondents 1 and 2 must pay the costs incurred by the appellant here and also in the High Court. Their Lordships will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellant — Nehra & Co.

Solicitors for Respondents —
Hy S. L. Polak & Co.

A. I. R. 1938 Privy Council 205

(From Singapore)

7th March 1938

LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SIDNEY ROWLATT AND SIR GEORGE RANKIN

Ahmed Angullia — Appellant.

v.

Estate & Trust Agencies (1927) Ltd. and others — Respondents.

Privy Council Appeal No. 124 of 1936.

Executor — Duties of — Contract by testator or intestate — Duty of legal representative to perform — Legal representative can pay even statute barred debts—Duty in case of onerous enforceable contracts explained.

Prima facie it is the duty of a legal personal representative to perform all contracts of his testator or intestate as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform, it is a different matter, though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute barred debt unless it has been judicially declared to be so. Nor in the case of an enforceable onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and it can never be the duty of an executor or an administrator to commit such an act: *(1867) L R 3 Eq 98, Expl.; (1898) L R 2 Ch 510, Disting.* [P 207 C 2; P 208 C 1]

A. F. Topham and J. Leonard Stone — *for Appellant.*

C. D. Myles and H. E. Francis — *for Respondents.*

Lord Romer. — This appeal raises an interesting question as to the duties of an executor in relation to the testator's contracts remaining uncompleted at his death. The facts that give rise to it are, so far as material, as follows: On 3rd January 1927, Kavena Hadjee Mohamed Yoosuf, hereinafter referred to as the intestate, conveyed certain lands in Singapore to his wife, the respondent Fatimah and himself upon trust for himself for life and after his death upon trust (subject to certain provisions as to

maintenance) for his son the respondent Kader Ebrahim if he should attain the age of 21 and in default upon trust for the said son's children as therein mentioned with an ultimate trust in favour of the intestate's said wife and a daughter. On 15th July 1927, the intestate entered into a contract with one Tan Peck Hood, a building contractor, which provided (as subsequently modified) for the erection on part of the settled land of six shops at a cost of $44,572. Hood proceeded with the work and had completed about three-quarters of it, when on 18th July 1928, the intestate died. At that time Hood had been paid over $28,000 of the contract price and a balance of some $16,000 accordingly remained due to him subject to his due performance of the contract. Their Lordships have no precise information as to how much of the $16,000 represented work completed but not paid for at the death of the intestate. As however three-quarters of the work had been done, about $5000 out of the $16,000 would appear to have already been earned by the contractor. After the death of the intestate a document which purported to be his will and which was dated 25th May 1928, was admitted to probate, probate being granted on 10th September 1928, to the appellant who had been thereby appointed the sole executor. The appellant proceeded to administer the intestate's estate, and in his capacity of executor paid $17,276 to Hood, who had in the meantime completed the erection of the six shops. It is not disputed that this was the sum due to Hood upon such completion. In order to provide this sum the appellant as executor mortgaged some property forming part of the intestate's estate, and in respect of such mortgage a sum of $3702.96 was paid by the appellant by way of interest. On 7th January 1932, probate of the alleged will was revoked by order of the Court on the ground that the same had not been properly executed, and thereupon the respondents Estate and Trust Agencies (1927), Limited, were appointed administrator of the intestate's estate. Such respondents are hereinafter referred to as the administrator.

On 16th May 1934, the administrator issued an Originating Summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) for the determination of the question whether the sum of $17,276 paid to Hood ought to be borne by the settled property, or ought to be paid out of the intestate's estate, and asking for general administration of such estate so far as might be necessary. The summons came on for hearing before Prichard J. who declared that the cost of completing the six shops ought to be paid out of the settled property and made an order for the administration of the intestate's estate including an account in the usual form of the intestate's personal estate come to the hands of the appellant. The respondent, Kader Ebrahim, appealed to the Court of Appeal from so much of this order as declared that the settled estate should bear the costs of completing the six shops, and such appeal was allowed, the Court declaring that such costs were not recoverable out of the settled properties without prejudice to any question that might arise as to how such costs should be borne as between the present appellant and the intestate's estate. Neither in the order of Prichard J., nor in that of the Court of Appeal does any distinction appear to have been drawn between the costs of the work done on the shops after the death of the intestate and the costs of that done but not paid for in his lifetime; and it must be taken that the costs referred to in the two orders consisted of the whole of the $17,276 and the $3702.96 interest.

The appellant's account of the intestate's estate come to his hands was in due course brought in before the Registrar of the Court, and in that account the appellant credited himself with the two sums in question as being properly payable out of the estate. The administrator and the next of kin objected, and thereupon the Registrar pursuant to O. 51, R. 20 of the Rules of the Supreme Court, 1934, referred the question to the Judge for determination. The reference came on for hearing before Burton (acting) C. J. and he, by an order dated 10th October 1935, directed the Registrar to disallow in the appellant's account the $17,276 except so much of it as the Registrar should consider would have been fair to pay to Hood as compensation for the breach of the contract to build the shops if the contract had been broken at the death of the intestate, and also to disallow so much of the $3702.96 as represented interest upon such part of the $17,276 as was directed to be disallowed. He further ordered the appellant to pay the administrator's costs of this reference, and also those of the five other respondents to this appeal, such respondents being the persons entitled beneficially to the property of the intestate.

In support of his claim to be allowed the whole of the two sums in question, the appellant relied upon the decision of Lord Romilly in (1867) L R 3 Eq 98.[1] That case in some respects bears so close a resemblance to the present one that it must be examined in some detail. The facts were these. An intestate had entered into a contract with some builders for the erection of a house on some freehold land belonging to him. At the time of his death the house was in course of erection but had not been finished. Letters of administration were in due course granted to two of his children, one of whom happened to be his heir at law. The house having been completed by the builder after the intestate's death, the heir at law, as one of the intestate's legal personal representatives, paid to the builder out of the intestate's personal estate the cost of such completion. According to the headnote of the report, it was held that the heir at law was entitled to have the house finished at the expense of the personal estate of the intestate. In point of fact Lord Romilly held nothing of the sort. It had indeed been laid down in (1694) 2 Vern 322[2] that the heir at law had such a right in the like circumstances, though on what grounds the decision in that case was founded is not at all apparent. It is true, too, that the case in (1694) 2 Vern 322[2] was cited in the arguments on behalf of the heir at law in (1867) L R 3 Eq 98.[1] But the question in the last mentioned case was whether the heir-at-law in his capacity of legal personal representative of the intestate ought to be allowed in taking the account of the personal estate come to his hands, the cost of completing the house. The decision was in favour of the heir at law, but it was not in any way based upon any rights he possessed as heir at law. The case in (1694) 2 Vern 322[2] is not even mentioned in Lord Romilly's judgment. His judgment was based solely upon the rights and duties of a legal personal representative in such circumstances and would have been precisely the same if the heir-at-law had not himself been one of the administrators of the intestate. It had been argued that the duty of the administrator was to commit a breach of the contract entered into by the intestate, inasmuch as it was one of which equity would not have decreed specific performance and to pay the builder the damages occasioned by that breach. Lord Romilly would have none of this.

> "It cannot be good law," he said, "that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate."

He then rejected the contention that the duty of a legal personal representative in this connexion depends in any way upon the question whether the contract is or is not one of which specific performance can be enforced and proceeded as follows :

> It cannot in my opinion be law that the next of kin should be entitled to call upon the heir at law to resist the Messrs. Laurance (the builders in question) and hinder them from coming on his land and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract.

He then pointed out that in any case the administrator if he paid the contractor damages without suit might be charged by the next of kin with having paid more than a jury would have awarded, and that if he went to law the amount of damages found by the jury together with the costs of the suit might exceed the costs of completing the contract and he concluded as follows :

> The administrator has in my opinion a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty.

All of which appears to their Lordships to be both good law and good sense. Prima facie it is the duty of a legal personal representative to perform all contracts of his testator or intestate as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform, it is a different matter: *see* (1885) 29 Ch D 358,[3] though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute barred debt unless it has been judicially declared to be so: *see* (1893) 3 Ch 282.[4] Nor in the case of an enforceable

1. Cooper v. Jarman, (1867) L R 3 Eq 98=36 L J Ch 85=12 Jur (N S) 956=15 W R 142.
2. Holt v. Holt, (1694) 2 Vern 322=23 E R 808.
3. In re Rownson, (1885) 29 Ch D 358=54 L J Ch 950=52 L T 825=35 W R 604=49 J P 759.
4. Midgley v. Midgley, (1893) 3 Ch 282=62 L J Ch 905=2 R 561=69 L T 241=41 W R 659.

onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and in their Lordships' judgment it can never be the duty of an executor or an administrator to commit such an act. It is this principle that lies at the root of the decision in (1867) L R 3 Eq 98.[1]

Burton (acting) Chief Justice however thought that (1867) L R 3 Eq 98[1] was distinguishable from the present case in that Kader Ebrahim was not the heir at law of the intestate. He was, said the learned Chief Justice, a stranger to the intestate's estate and unlike the heir at law in (1867) L R 3 Eq 98[1] had no claim to have the contract carried out. In saying this he seems to have been misled by the headnote in that case, and failed to notice that the decision in no way turned upon any rights the heir at law might possess but solely upon the rights and duties of the administrator. He also thought that he was warranted in refusing to follow (1867) L R 3 Eq 98[1] by the decision of North J. in (1898) L R 2 Ch D 510.[5] It cannot be denied that this latter decision fully justified the statement of the Acting Chief Justice that Kader Ebrahim had no claim to have the intestate's contract with the builder carried out. But it is no authority for the proposition that the cost of completing it was not proper to be allowed to the appellant in taking his account. The facts of that case were substantially as follows. A testator by his will had devised certain land to his wife for life. Shortly before his death he had entered into a contract with some builders for the erection of some cottages on the land. He had also entered into a contract with the same builders for the erection of a house on some land that belonged not to him but to his wife in her own right. At the time of his death neither of these contracts had been completed, and after his death his executors prevented the builders from finishing the work. The wife thereupon claimed to be entitled to have the two contracts completed at the cost of the testator's personal estate. North J. acceded to the wife's claim in respect of the first contract but rejected it in respect of the second. He thought that (1867) L R 3 Eq 98[1] was an authority in her favour so far as the land devised to her was concerned, treating a devisee as being in the same position as an heir-at-law. If no distinction is to be drawn between a devisee and an heir-at-law for this purpose, (1694) 2 Vern 322[2] was no doubt an authority in favour of the learned Judge's decision. But with all respect to him and for the reasons already given, (1867) L R 3 Eq 98[1] was not. As to the second contract, he held that the wife being a stranger to the testator's estate had no right to have it carried out at the expense of his personal estate. Whether (1898) L R 2 Ch D 510[5] was rightly decided or not is a question upon which it is unnecessary for their Lordships to express any opinion. It is sufficient to say that it has no bearing upon the present case.

An appeal from the decision of the Acting Chief Justice was taken to the Court of Appeal, and in due course came before Huggard C. J., Whitley and Terrell JJ., who, by order dated 18th January 1936, dismissed the appeal with costs. They were unanimous in holding that the appellant could not be allowed the two payments in question. Before considering the reasons given by them for this decision, reference must be made to an argument advanced before them by the appellant which was in the nature of a preliminary objection. He contended that the items relating to the erection of the shops could only be disallowed on the footing that a breach of trust had been committed by the appellant, and that as a breach of trust on his part had not been specifically pleaded he could not be charged with one in taking the ordinary account of the personal estate of the intestate come to his hands. This contention was rejected by the Court of Appeal and in their Lordships' opinion was rightly rejected. In taking the account the appellant could not, of course, be charged with damages occasioned to the estate by a breach of trust. But it was incumbent upon him to justify his payments, and those that he could not justify would necessarily have to be disallowed. As was said by Chitty L. J. in (1898) 1 Ch 162[6] at p. 172 :

> On taking the common account of their receipts, executors can properly be, and are often, charged with a devastavit arising on the accounts themselves. On taking the account they stand charged with their receipts; and if they seek to discharge

5. In re Day Sprake v. Day, (1898) L R 2 Ch D 510=67 L J Ch 619=79 L T 437=47 W R 238.

6. Re Stevens; Cooke v. Stevens, (1898) 1 Ch 162 =67 L J Ch 118=77 L T 503=46 W R 177= 14 T L R 111.

themselves by unlawful payments, their discharge is disallowed.

Turning now to the reasons given by the learned Judges in the Court of Appeal for thinking that the two sums in question ought to be disallowed as being unlawful payments, their Lordships find that the Chief Justice and each of his learned colleagues considered the case to be covered by the decision of North J. in (1898) L R 2 Ch D 510,[5] a decision which was not, of course, binding upon them but was one from which they said they were not prepared to dissent. The Chief Justice in referring to (1867) L R 3 Eq 98[1] said this:

> It was held by Lord Romilly that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. Now when one reads the judgment of Lord Romilly in that case it would appear to support strongly the appellant's contention in the present case. But Lord Romilly's judgment was considered in the later case of *Sprake* v. *Day*[5] and it is clear from the decision of North J. that Lord Romilly's observations in *Cooper* v. *Jarman*[1] must be read in the light of the facts of that particular case.

He then referred to the facts in (1898) L R 2 Ch D 510[5] and the reasons there given by North J. for distinguishing between the two contracts in that case and proceeded as follows :

> It appears to be clear from the decision in *Sprake* v. *Day*[5] that the distinction drawn by North J. between the two contracts was based on the fact that one property belonged to the testator and passed under his will, whereas the other property . . . belonged to a stranger. In other words, in one case the completion of the contract benefited the estate of the testator; in the other case there was no such benefit. In the former case the decision in *Cooper* v. *Jarman*[1] therefore applied; in the latter it did not. The test to be applied in each case is whether the completion of the contract is for the benefit of the deceased's estate.

The judgments of Whitly and Terrell JJ., proceeded upon the same line of reasoning, and upon the same view of the cases in (1867) L R 3 Eq 98[1] and (1898) L R 2 Ch D 510.[5] They also thought that they found in those two decisions authority for the proposition that in such a case as the present, the test to be applied is whether the completion of the contract is for the benefit of the estate of the intestate. Applying that test the Court very naturally dismissed the appeal. It was impossible to say upon the evidence that the estate of the intestate was benefited by the completion of the shops. Their Lordships are unable to agree that the test to be applied is that adopted by the Court of Appeal. If the appellant were seeking to justify the two payments on the ground that Kader Ebrahim had a right to have the contract for the erection of the shops completed at the cost of the intestate's estate, the decision in (1867) L R 3 Eq 98[1] would not assist him, and the decision in (1898) L R 2 Ch D 510[5] as regards the second contract in that case would be an authority against him. But the appellant does not seek to justify the payments on any such ground. He merely seeks to justify them on the grounds stated by Lord Romilly in (1867) L R 3 Eq 98[1] the head note in which case would seem to have misled the Court of Appeal just as it had misled the Acting Chief Justice in the Court below.

In their Lordships' judgment, it was the duty of the appellant as the apparent legal personal representative of the intestate to honour the intestate's obligations under the contract in question unless an opportunity presented itself of coming to some arrangement with the builder that would be of advantage to the estate that he was administering. There is no evidence that any such opportunity did in fact present itself, and the onus of proving the existence of such an opportunity lay, in their Lordships' opinion, upon the respondents. Burton (acting C. J.) no doubt in the course of his judgment said that the contractor would have been perfectly satisfied with a sum sufficient to compensate him for loss of expected profits, and that he would have been satisfied by a payment which must have been substantially less than the $17,276 paid to him. But in making these observations, the learned Judge would appear to have been merely hazarding a guess; for, there was no evidence before him as to the intentions or desires of the contractor. If a guess is to be indulged in, it would seem more probable that the contractor would have preferred to complete the contract. For, apart altogether from any loss to his reputation by leaving the shops in an unfinished state, the sudden breaking off of the work might have involved the temporary unemployment of members of his staff and the loss of the building material already on the site, seeing that he would have had no right as against Kader Ebrahim to enter upon the land for the purpose of removing it. And even if he had been willing to agree to leave the work unfinished upon the terms of being paid compensation, all such matters would have come into his calculations, and there seems no reason to suppose that he would have been content to receive merely his loss of profit or any

sum less than the amount actually paid to him by the appellant. Nor could the appellant have prevented the contractor from completing the contract if the contractor wished to continue the work, for the land on which the shops were being erected was the land of Kader Ebrahim. Had therefore the appellant purported to repudiate the contract, he would not have benefited the estate unless the contractor accepted such repudiation which seems unlikely; and if the contractor had accepted such repudiation and sued the appellant for damages it is impossible to tell how much such damages together with the costs of the action would have amounted to. But in any case, the appellant owed no duty to the estate that he was administering to commit the unlawful act of repudiating the contract, and he is not shown to have had any opportunity of coming to a friendly arrangement with the contractor that would have been more beneficial to the intestate's estate than paying the balance of the contract price unpaid at the intestate's death.

Their Lordships are accordingly of opinion and will humbly advise His Majesty (1) that the appeal should be allowed and the orders of 10th October 1935 and 18th January 1936, should be discharged; and (2) that the Registrar should be directed to allow in the appellant's account the sums of $17,276 and $3762.96. As regards the costs, the order should be as follows: (1) that the respondents ought to pay to the appellant his costs as between party and party on the higher scale of the hearing before Acting Chief Justice, Burton on 10th October 1935, and before the Court of Appeal on 18th January 1936; (2) that all costs already paid by the appellant under those orders ought to be repaid to him by the respondents respectively; (3) that the costs of the appellant of the order of 25th September 1935, and his costs made costs of the cause by order of the Supreme Court dated 28th August 1936, ought to be paid and dealt with in all respects in the manner herein directed with reference to the costs of this appeal; (4) that the costs of the appellant as between solicitor and client on the higher scale of the hearing of 10th October 1935, and in the Court of Appeal on 18th January 1936, and of this appeal hereinafter referred to after giving credit for the party and party costs ordered to be paid by the respondents and recovered by him from the respondents in these proceedings ought to be his costs in the cause; (5) that this order ought to be without prejudice to any claim of the respondents or any of them to be allowed their costs of all the above mentioned proceedings out of the estate of the intestate; (6) the appellant's costs of this appeal as between party and party will be paid by the respondents.

B.D./R.K. *Order accordingly.*

Solicitors for Appellant —
Emmett & Co.

Solicitors for Respondents —
Peacock & Goddard.

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(From Lucknow : A I R 1932 Oudh 199)

27th May 1938

LORDS THANKERTON, ROCHE AND ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN:

Rai Bajrang Bahadur Singh and another — Appellants.

v.

Rai Beni Madho Bakhsh Singh and others — Respondents.

Privy Council Appeal No. 77 of 1934; Oudh Appeal No. 8 of 1932.

(a) U. P. Land Revenue Act (3 of 1901), S. 233 (k) — Question of title not raised in partition proceedings — Partition completed — Question cannot be raised in Civil Court.

If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed, S. 233 (k) debars parties to the partition from raising the question subsequently in a Civil Court: *23 All 291 and A I R 1917 All 258 (F B), Approved; A I R 1931 All 462, Ref.* [P 214 C 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 106—'Partition'.

The word 'partition' is not used in the narrow sense of mere arrangement into units of area. It imports and includes that rights in these units are distributed among the sharers. [P 215 C 1, 2]

(c) U. P. Land Revenue Act (3 of 1901), S. 233 (k)—Scope.

It cannot be said that the only thing excluded from the cognizance of the Civil Court by Cl. (k) is the schematic arrangement of the land into units of area and that no question of proprietary right comes within the prohibition of access to the Civil Court. [P 215 C 2]

(d) U. P. Land Revenue Act (3 of 1901), S. 233 (k)—"With respect to partition."

A suit is brought with respect to the partition if it is brought to impugn the distribution which by partition has been effected under the Act. [P 216 C 1]

(e) U. P. Land Revenue Act (3 of 1901), Ss. 111, 112 and 233 (k)—Partition proceedings —No objection under S. 111—Principle of res judicata does not apply.

The principle of res judicata will not apply where no objection was made under S. 111 with the result that Ss. 111 and 112 do not come into operation. In such a case the partition proceeds upon the entries in the khewat : the Collector does not function as a Civil Court, and does not have in that or any other capacity to decide as to its correctness expressly or implicitly. To hold that the right to a decision from the Civil Court is ousted by the mere fact that the Collector proceeded upon the footing of the record is not sound doctrine so far as regards the principle of res judicata : *A I R 1916 All 83 and A I R 1917 All 258 (F B), Rel. on.* [P 216 C 1]

H. W. Williams — *for Appellants.*
W. Wallach — *for Respondents.*

Sir George Rankin — The question for determination in this case relates to partition proceedings which from 3rd October 1903 to 1st July 1907 took place under the United Provinces Land Revenue Act (U. P. Act 3 of 1901) in respect of a village called Nain situate in pargana Salon in the district of Rai Bareli in Oudh. The question has been described by the Chief Court of Oudh as of importance and judicial opinion in the United Provinces has for many years been divided upon the principle to be applied. The suit out of which the present appeal arises was brought in the Court of the Subordinate Judge of Rai Bareli by the two appellants together with two other persons on 20th February 1930 against 68 persons interested in the lands of the village : defendant 69 being joined pro forma as a person having the same interest as the plaintiffs. The relief claimed by the plaint was a declaration that the plaintiffs and defendant 69 were superior proprietors as distinct from under-proprietors of various plots of land specified in list A attached to the plaint. The aggregate area of these plots is about 71 bighas : they are not contiguous but are scattered throughout the various parts of the village. By reason of certain compromises entered into pending this appeal to His Majesty, there remain in controversy only five plots with a total area of 5 bighas and 7 biswas 16 biswansis and respondent 3, Thakurain Chhabinath Kuar (defendant 3), is the only contesting respondent. She is one of the two widows of one Rai Chait Narain Singh, her co-widow being Mt. Seot Raj Kuar. At the time when partition proceedings, as already mentioned, were begun in 1903 the plaintiffs were recorded as having only under-proprietary right in these five plots. As a result of the partition, these plots were included in the revenue paying unit or 'mahal', comprising 164 bighas which was given the name of Rai Chait Narain Singh and assessed as at annual revenue of Rs. 51. The plaintiffs were recorded as having an under-proprietary interest therein but as holding them rent free. The superior interest was recorded as belonging to Rai Chait Narain Singh and another. It now stands in the names of his two widows who hold as limited owners under the Hindu law. Mt. Seot Raj Kuar, by registered deed dated 20th September 1933, has compromised with the appellants on terms which purport to agree that the latter be recorded as the superior proprietors, that they shall get revenue thereon separately assessed and that she shall not be liable for the payment of such revenue.

At the trial of the suit the learned Subordinate Judge found against the plaintiffs on the issue as to their title to the superior right in the suit lands. He also held that their suit was bad as being one to disturb the partition of 1906 and as contrary to S. 233 (k) of the Act of 1901. The Division Bench of the Chief Court on appeal referred to a Full Bench two questions :

1. Is the relief of declaration prayed for by the plaintiffs in the present suit barred by the provisions of Cl. (k), S. 233, Land Revenue Act, 1901 by virtue of partitions of 1906 and 1910 ?

2. Is the jurisdiction of the Collector to act under Cl. (c), S. 111 (1), Land Revenue Act, 1901 ousted when the question of proprietary title alleged to have been decided by him in the partition proceedings mentioned above had already been determined by a Court of competent jurisdiction ?

The Full Bench (10th March 1932)* having answered the first question in the affirmative and the second in the negative, the Division Bench on 7th April 1932 dismissed the appeal. From this decree the present appeal has been brought pursuant to a certificate granted on 21st September 1932 by the Chief Court that the case complies with the requirements of S. 110 and is also fit for appeal to His Majesty under Cl. (c) of S. 109, Civil Procedure Code It has been contended for respondent 3 (hereinafter called the respondent) that the amount or value of the subject-matter in dispute on this appeal had been reduced to less than Rs. 10,000 by compromise with certain of the defendants effected after the

[* *Reported in* (1932) 19 A I R Oudh 199=137 I C 606=7 Luck 716=9 O W N 488 (F B).]

date of the certificate but before 12th December 1932, when the appeal was finally admitted, and that the appeal had become incompetent accordingly. Their Lordships are far from holding that this contention would have prevailed apart from the certificate as to fitness under Cl. (c), S. 109, but in view of the express reference to that clause in the judgment of the Chief Court, they think that the objection must clearly be overruled.

The second of the two questions referred to the Full Bench was apparently propounded in the interest of the plaintiffs. Before their Lordships, the negative answer given to it by the Full Bench has not been contested in argument but it is in any view unnecessary that their Lordships should give any decision thereupon. As the sole question for decision on this appeal is whether the suit is barred by Cl. (k), S. 233 of the Act of 1901, it is necessary to consider in relation to that clause the nature and effect of partition proceedings taken under Ch. 7 of the Act, to examine the circumstances in which the plaintiffs claim to be entitled to relief, and to ascertain the results which would follow from the grant of the relief claimed. S. 233 upon which the present case turns, constitutes Part B of Ch. 11 of the Act. The subject-matter of the chapter is described as "Miscellaneous," and that of Part B as "Jurisdiction of Civil Courts" or as given in the margin of the section "matters excepted from the cognizance of Civil Courts." These matters are stated in 13 clauses (a) to (m), of which the most important for the present case is (k).

233. No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters :

(k) partition or union of mahals except as provided in Ss. 111 and 112.

Other matters excepted from the cognizance of Civil Courts by the section are the liability of any land, not excepted under S. 58, to be assessed to revenue; the claim of any person to engage for the payment of revenue; the amount of revenue assessed on any mahal or portion of a mahal; the amount to be paid to a proprietor by an inferior proprietor when that amount has been fixed by the Settlement Officer; claims connected with or arising out of the collection of revenue. The words "partition and union of mahals" which appear in Cl. (k) appear earlier in the Act as the heading to Ch. 7. They had stood at the head of the corresponding provisions of the previous Acts (19 of 1873 and 17 of 1876). The usual meaning of mahal is that given in Cl. (a) of S. 4—"any local area held under a separate engagement for the payment of land revenue". Though the definition includes " any revenue-free area for which a separate record of rights has been framed" and certain other cases mentioned in the section, the root idea is unit of area for revenue purposes. In Ch. 7 the Act does not provide any special definition of "union of mahals" which is a simple matter dealt with by Ss. 139 and 140. But it is otherwise with " partition" which is defined by S. 106 :

106. "Partition" means the division of a mahal or of a part of a mahal into two or more portions, each consisting of one or more shares.

In " imperfect partition" the several portions remain jointly responsible for the revenue assessed on the whole mahal.

In "perfect partition" the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon.

The procedure prescribed in this Chapter shall be followed in all partitions, whether imperfect or perfect, except where it is otherwise expressly declared.

The Chapter provides that an application for partition may be presented by one or jointly by two or more of the recorded co-sharers of a mahal (S. 108) but that the Collector may at any stage stay the partition and order the proceedings to be quashed (S. 109). On receiving an application the Collector is to issue a proclamation to all the other recorded co-sharers to appear and state their objections if any to the partition : any other recorded co-sharer may join in applying for partition (S. 110). If the partition is not to be made by the parties themselves or by arbitrators but by the Collector or an Assistant Collector a partition proceeding *(tarz-i-taqsim)* is to be drawn up declaring the nature and extent of the interests of the persons applying for the partition and of any other persons who may be affected thereby, detailing how partition is to be made, and deciding all disputed questions that may have arisen in connexion therewith (Sec. 114). This proceeding bears some analogy to what in a suit before a Civil Court would be called a preliminary decree for partition. It is prior to this stage that Ss. 111 and 112—both of which are mentioned in Cl. (k), S. 233 — apply to the case and

enable an objection by a recorded co-sharer involving a question of proprietary title to come before a Civil Court at first instance or on appeal if it has not already done so.'

111. — (1) If, on or before the day so fixed, any objection is made by a recorded co-sharer, involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, the Collector may either—(a) decline to grant the application until the question in dispute has been determined by a competent Court, or ; (b) require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or (c) proceed to inquire into the merits of the objection.

(2) When proceedings have been postponed under Cl. (b), if such party fails to comply with the requisition, the Collector shall decide the question against him. If he institutes the suit, the Collector shall deal with the case in accordance with the decision of the Civil Court.

(3) If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits.

112. All decrees passed under sub-s. (3) of the preceding section shall be held to be decrees of a Court of Civil Judicature of the first instance, and shall be open to appeal to the District Judge or High Court or the Judicial Commissioner, as the case may be, under the rules applicable to appeals to those Courts, and the Appellate Court may issue a precept to the Collector, desiring him to stay the partition pending the decision of the appeal.

The remaining sections of Ch. 7 contain many provisions as to the principles to govern the division of the land into different portions to be allotted to the various sharers—a matter which in cases of perfect partition affects the revenue directly. These sections cover such matters as lands already held by a co-sharer in severalty, buildings of one sharer on the land allotted to another, garden lands, wells and so forth. They provide that if the holding of any tenant is divided the rent is to be apportioned, and in all cases the revenue of the mahal is to be distributed over the several portions (129, 130). There is provision for appeals from the Assistant Collector to the Collector, and for appeals to the Commissioner from the Collector's orders on a partition proceeding or disallowing partition. S. 131 is important :

131. A partition shall not be complete until the Collector has passed an order confirming it.

When the partition has been confirmed, the Collector shall issue a proclamation thereof, and the partition shall take effect from the first day of July next following the date of such proclamation.

In the present case the provisions of Ch. 7 were applied to the village of Nain. They began with an application (S. 107) on 3rd October 1903, by certain co-sharers of the village for a perfect partition to be made of the lands of the village which at that time was a single mahal. Proclamation was duly made calling upon the other co-sharers to appear and state objections if any (S. 110). The plaintiffs-appellants were recorded as co-sharers of the village apart altogether from their interest in any of the plots in suit. As such they received due notice of the application for partition and on 12th March 1904, they filed an application in respect of their recorded interest as superior proprietors agreeing to partition [S. 110 (2)] but asking that their interest be included in a particular mahal. With reference to the plots in suit the plaintiffs were recorded as under-proprietors and not as having the superior right ; though their claim now is that they were entitled to the superior interest and that the record was erroneous. They say that in 1876 their right had been established by the decree of a Civil Court but they have to admit that in 1903 the record was against them. They made no claim to the superior interest in these plots or any of them in the course of the partition proceedings. Their interest in the plots in suit was treated as a rent-free but under-proprietary interest with the result that by the partition their interest in the village lands as superior proprietors was included in one mahal while the five plots now in dispute were included in another, the plaintiffs being shown as under-proprietors in the khewat of under-proprietors of that mahal. The village was divided into five mahals, the fifth being a residuary mahal comprising the lands of those who did not seek partition. The partition proceeding (S. 114) was approved by the Collector on 16th September 1904 and the partition was confirmed on 28th September 1906, with effect from 1st July 1907 (S. 131). The various plots originally claimed by the plaint were distributed over all five of the new mahals : the five plots still in controversy were included in the second which was given the name of Rai Chait Narain Singh. As representing a 1 anna 5 pies hare in the village, this mahal included 164 bighas and was assessed to revenue at Rs. 51. No objection or appeal was taken by the plaintiffs at any time between 1903 and 1907. In 1909 an imperfect partition of the residuary mahal was carried out, but as the five plots now in dispute were not in that mahal it need not be further referred to. The plaintiffs

remained in possession of the suit lands as of old, paying neither revenue nor rent till 1929. In that year proceedings under S. 107, Oudh Rent Act (Act 22 of 1886) were taken against them before the Assistant Record Officer by the proprietors of different mahals including the mahal Rai Chait Narain Singh. On 25th June 1929, the Assistant Record Officer assessed them to rent notwithstanding their claim to be proprietors — a claim then set up, so far as appears, for the first time since some date before 1903. The plaintiffs on 20th February 1930, filed the present suit for a declaration that they are the superior proprietors of the lands specified in the plaint and not inferior proprietors.

If the plaintiffs be granted the relief claimed, it is plain that the result of the partition of 1903.07 will be substantially altered. All the Courts in India are agreed as to this. It is no answer to say that the plaintiffs could be declared to be joint proprietors of a mahal along with the persons to whom it was allotted at the partition. Such a declaration would produce a result contrary to the very purpose of the applicants for partition (viz. to separate their shares) and a highly unjust result, in respect that failure by the plaintiffs to pay their share of revenue would compel the present proprietors to pay it in order to avoid a sale of the entire mahal. That alone would convert the partition of 1906 into something which was not intended by the Collector or by any party thereto and which might well be intolerable. But the declaration would also mean a reduction in the assets of the mahal and a disturbance of the arrangements for the payment of the revenue, and indeed an extensive disturbance if the original plaint with its 68 defendants be regarded. All the Courts in India —the Assistant Record Officer in the rent case, and the Judges in the trial Court and Chief Court—have been satisfied that the plaintiffs' suit is in these circumstances barred by virtue of the partition of 1906, but the judgments in the Chief Court disclose a difference of opinion as to the principle applicable under the Act of 1901 to the case. Though the first question referred to the Full Bench had reference to Cl. (k), S. 233 the learned Chief Judge answered it by saying that the suit was barred by virtue of the previous partitions but not by the provisions of Cl. (k). He considered that it was barred by the general principle of res judicata, the Collector being regarded by him as a Court of exclusive jurisdiction. The other members of the Full Bench held that the suit was barred by Cl. (k) but that the principle of res judicata did not apply. This difference of opinion is but the reflection of a divergence in the previous authorities: the matter seems indeed to have been constantly before the Courts in Agra and in Oudh: from time to time it has appeared to be settled, only to become unsettled by subsequent decisions.

With all respect to the learned Judges in 53 All 568,[1] their Lordships think that to approach the construction of S. 233 of the Act by first forming a view upon the disputable question of res judicata is a mistake in method. Upon an independent examination of the provisions of the Act of 1901, their Lordships have arrived at the same construction as was put upon the previous Act (19 of 1873) by the Full Bench of the High Court at Allahabad in 23 All 291,[2] and upon the present Act by Banerji and Tudball JJ. in 39 All 469.[3] If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed, S. 233 (k) in their Lordships' opinion debars parties to the partition from raising the question subsequently in a Civil Court. This proposition is wide enough to cover the present case and it is unnecessary to consider whether it might not be framed more widely. As was well said by Strachey C. J. in the former case :

> The Legislature intended to give to co-sharers raising questions of title a limited opportunity and a limited time for having such questions determined by a Civil Court, and in effect provided that such questions might only be so determined if raised at such a time as to avoid the inconvenience .... arising where interference with an actually completed distribution is sought. (p. 300).

As against this view of S. 233, Cl. (k) there is the narrower interpretation to be collected from the dissenting judgment of Richards C. J. in 39 All 469[3] and the judgment of Bennet J. in 53 All 568.[1] Proceeding upon the basis that partition means the opposite of union of mahals, Richards C. J. considered that these words refer to units of area which the revenue authorities

1. Ram Raikha Misir v. Lallu Missir, (1931) 18 A I R All 462=133 I C 468=53 All 568= 1931 A L J 307.
2. Muhammad Sadiq v. Laute Ram, (1901) 23 All 291=1901 A W N 86.
3. Bijai Misir v. Kali Prasad, (1917) 4 A I R All 258=41 I C 912=39 All 469=15 A L J 496 (F B).

create in the course of partition proceedings. He did not agree that the expression partition means or includes the actual division as between the parties and the determination of their title :

> If the plaintiff in this suit was successful the property would remain in the same unit in which it was placed by the Revenue Court notwithstanding the plaintiff's decree for possession. The unit would not be affected though the ownership of the property in it would be . . . . . If the Legislature intended to prevent questions of title being reopened after partition it would have been simpler, fairer and less calculated to do injustice if the rules of res judicata as laid down in the Civil Procedure Code had been incorporated.

The narrower view of S. 233 (k) was thus expressed by Bennet J. :

> The section only bars suits which would alter the partition in regard to the amount of shares in any mahal or subdivision of a mahal. We consider that this view of S. 233 (k) is the correct view and that no advantage accrues from adding an additional interpretation of S. 233 (k) in the wider sense to make it co-extensive with the rule of res judicata.

In the present case the learned Chief Judge presiding over the Full Bench rested his view that Cl. (k) did not bar the plaintiffs' suit upon the definition of "partition" contained in S. 106 of the Act :

> As already stated, partition, according to Section 106, means the division of a mahal or of a part of a mahal into two or more portions each consisting of one or more shares. I feel no difficulty in saying that having regard to the defined sense of the word partition the present suit is not a suit with respect to partition.

Their Lordships think this line of reasoning to be unsound, and that the phrase "partition and union of mahals" refers to a process regulated by Chap. 7 of the Act and the result thereof which is given statutory effect. The words occur at the head of the chapter as a statement of its subject-matter. Definitions may be more or less successful and it is not always safe to take an abstract word in its most abstract sense. For the purposes of the Act it is not possible to say on the strength of the definition that "partition" means nothing more than the re-arrangement of the land into units of area. It imports and includes that rights in these units are distributed among the sharers. This indeed in the case of imperfect partition is the main feature and almost the whole of the operation. The amount of revenue imposed depends upon the "unit"—that is, the amount of land brought under one assessment: this depends mainly upon the person or persons interested and their relations with one another. When S. 106 states that a mahal is divided into two or more portions each consisting of one or more shares, it refers to distribution among the sharers according to their rights — not merely to a division of the land into units of area. An "application for partition" (S. 107), is surely an application for a change to be made in the form or method in which the applicant's interest is held : to have a certain amount of land allotted to the applicant in severalty and in such wise that he shall be responsible for such revenue only as is attributable to his own land. When S. 114 speaks of the partition proceeding " detailing how the partition is to be made and deciding all disputed questions that may have arisen in connexion therewith", it surely refers to the principles upon which the various portions are to be allotted — not merely the principles on which their size and position is to be determined. S. 118 and the following sections are clear to this effect. But S. 233 Cl. (k) itself contains words which show that partition is not used in that clause in the narrow sense of mere arrangement into units of area. The words "except as provided in Ss. 111 and 112" are inconsistent with the construction contended for. These sections provide means whereby objections involving a question of proprietary title can be brought before the Civil Courts. The exception is made in their favour by Cl. (k) because otherwise the sections would conflict with the clause—that is because suits raising questions of proprietary title are hit by the prohibition against instituting suits with respect to partition of mahals. The exception makes it exceedingly difficult to maintain that the only thing excluded from the cognizance of the Civil Court by Cl. (k) is the schematic arrangement of the land into units of area and that no question of proprietary right comes within the prohibition of access to the Civil Court. This is not a new point : it was before the Court in 39 All 469[3] and is referred to by Richards C. J. at p. 476 :

> It is said that the words "except as provided by Ss. 111 and 112" show that the expression "partition" means or at least includes the actual division as between the parties and the determination of their title. It may possibly be that the framers of the section hoped the introduction of these words would prevent subsequent questions of title being raised. Another explanation might be to obviate some contradiction or incdnsistency between Ss. 111, 112 and S. 233 (k).

This passage shows that the argument was appreciated : but in their Lordships' opinion it was not answered. Moreover in order to provide that a Civil Court dealing in the ordinary course with titles to land

should not make any order which would alter the "units of area," it seems to be at once ineffective and excessive to enact that no person shall institute in the Civil Court any suit with respect to partition. In order to divide a mahal into shares, which is the meaning of partition as defined by S. 106, a number of important steps have to be taken to arrive at a result effective in accordance with S. 131. These steps are detailed in the intervening sections. A suit is brought with respect to the partition if it is brought to impugn the distribution which by partition has been effected under the Act.

The question of res judicata has been much considered in connexion with S. 233 (k) and in the present case though no question was referred to the Full Bench as to res judicata the learned Chief Judge based his decision entirely upon that ground. What the position would be in such a case as the present apart from any special statutory provision is a question difficult and not to be lightly decided, but their Lordships agree with Srivastava and Raza JJ., the other members of the Full Bench, in holding that the principle of res judicata would not apply where, as in the present case, no objection was made under S. 111 with the result that Ss. 111 and 112 did not come into operation. In such a case the partition proceeds upon the entries in the khewat : the Collector does not function as a Civil Court, and does not have in that or any other capacity to decide as to its correctness expressly or implicitly. To hold that the right to a decision from the Civil Court is ousted by the mere fact that the Collector proceeded upon the footing of the record is not, in their Lordships' view, sound doctrine so far as regards the principle of res judicata. Their Lordships on this point are in agreement both with Richards C. J. in 38 All 302[4] at p. 310, and with Banerji J. in *Bijai Misir's case*[3] *(supra)*.

The facts of the present case raise no question as to the rights of anyone to bring a civil suit pending the partition proceedings, or as to the rights of a person who is not a recorded cosharer or was not a party to the proceedings, or as to any case between persons whose interests were not opposed for the purpose of the partition. A considerable number of decisions have been given upon such cases, but their Lordships have not had occasion to hear argument upon them and do not deal with them—more especially as their Lordships consider that their decision upon the point arising in the present case is in confirmation of the main current of authority in India.

Since this appeal to His Majesty was brought, agreements of compromise have been entered into between the appellants and three sets of respondents. While entitled to assume that these respondents are competent to deal with their own interests in the land of the village, their Lordships are not in a position to make certain that the agreements as they stand are unobjectionable from the standpoint of the revenue authorities and (in the case of the agreement with Mt. Soet Raj Kuar) compatible with all the rights of the contesting respondent Thakurain Chhabinath Kuar. They will humbly advise His Majesty that the appeal should be dismissed and that the order to be made on this appeal should record that as against the respondents other than Thakurain Chhabinath Kuar the dismissal is directed by reason of the said agreements; but they are not prepared to advise that there should be any direction that the said agreements should be carried into effect. If any question should arise as to the carrying out of any of the compromises it must be dealt with in proceedings to be instituted in India in accordance with law. The appellants must pay to Thakurain Chhabinath Kuar her costs of this appeal.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellants—Nehra & Co.

Solicitors for Respondents —
Hy. S. L. Polak & Co.

4. Kalka Prasad v. Manmohan Lal, (1916) 3 A I R All 83=33 I C 86=38 All 302=14 A L J 373 (F B).

*** A. I. R. 1938 Privy Council 216**

(From Allahabad : A I R 1935 All 198)

27th May 1938

LORDS THANKERTON, ROCHE AND ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN

Mahant Satnam Singh — Appellant.

v.

Bawan Bhagwan Singh — Respondent.

Privy Council Appeal No. 119 of 1936 : Allahabad Appeal No. 37 of 1934.

(a) Hindu Law — Religious endowment—Math—Succession to Mahant and ownership of property is regulated by custom of particular math—Plaintiff must allege and prove it.

Succession to the office of Mahant, and the ownership of the Math property, limited by the period of tenure of the office, is to be regulated by the custom of the particular Math, and the plaintiff in the suit is bound to allege and prove what the custom of the particular Math is and that his acquisition of the Mahantship was in accordance with such custom. [P 217 C 2]

*** (b) Hindu Law — Religious endowment— Math — Mahant resigning during his life and installing his successor— Fraternity should be made aware of vacancy and given opportunity of confirming the nominee— Notice of Mahant's intentions and confirmation by the Bhek do not involve strict formalities.**

In the normal case of the death of a Mahant, the members of the fraternity will be fully aware of the vacancy in the office, and the usual practice will be for the installation of his successor usually nominated by him, to take place on seventeenth day after the death. On the other hand, when the Mahant resigns during his life and installs his successor on the gaddi, it is obvious that the fraternity should be made aware of the proposed vacancy in the office and should be given the opportunity of confirming or refusing to confirm the nominee. As regards notice of the Mahant's intentions, this is not a matter of strict formalities, and the practice of sending a runner round with a verbal intimation meets the situation. Again, as regards confirmation by the Bhek, it does not involve anything in the nature of an election or the passing of a resolution; it is important to remember that the members of the Bhek present actually take part in the ceremony; the application of "tilak" to the forehead and the money presents made by them are a part of the ceremonies, and may well be held to establish confirmation of the person installed. [P 218 C 2; P 219 C 1]

A. M. Dunne and J. M. Parikh — *for Appellant.*

Lord Thankerton. — The appellant seeks reversal of both the judgment and decree of the Court of the First Additional Subordinate Judge at Benares dated 3rd July 1931, and the judgment and decree of the High Court of Judicature at Allahabad dated 18th September 1934, which affirmed it. The appeal was heard ex parte as the respondent did not appear.

The dispute relates to the office of Mahant of the Chaitanya Math, founded in Benares according to the rules and practice of Sadhus of a Sikh community known as the Nanakshahi Nirmali Sampradaya, according to the custom and usage of the Math. For the purposes of this appeal, the facts are much clarified by concurrent findings by the Courts below, and the matters in dispute are narrowed so that the main point left in dispute is whether the respondent, who is plaintiff in the suit, was validly installed as Mahant on 13th April 1928.

The last Mahant, Ratan Singh, died on 23rd June 1928, leaving a will dated 5th June 1928, under which he nominated the appellant as his successor and made him owner in possession of the Math property. The appellant claims that his nomination was subsequently accepted by the Bhek, or fraternity, and that he was duly installed on the gaddi by them on 9th July 1928, in accordance with custom. The appellant has since, in fact, continued in possession of the Math and the Math property.

While the validity of the appellant's installation has been disputed by the respondent on other grounds, the main ground is that the respondent had already been validly installed, and that accordingly there was no vacancy at the time of the appellant's installation. Mr. Dunne, on behalf of the appellant, admitted that this contention must succeed, if the respondent's installation was a valid one. If the respondent's installation was invalid, the suit must fail, as it is framed solely on the basis that the respondent is Mahant, and in this view, it would be equally unnecessary to consider the validity of the appellant's installation. It may, however, be mentioned that the respondent's attack on the validity of Mahant Ratan Singh's will has failed, by reason of concurrent findings of the Courts below, and the only question is whether it was inoperative, on the ground that prior to its date Ratan Singh had already effectively divested himself in favour of the respondent. The decision of this appeal, therefore, turns solely on the validity of the respondent's installation.

There can be no doubt that succession to the office of Mahant, and the ownership of the Math property, limited by the period of tenure of the office, is to be regulated by the custom of the particular Math, and the respondent, as plaintiff in the suit, is bound to allege and prove what the custom of the particular Math is and that his acquisition of the Mahantship was in accordance with such custom. In the present case the pleadings disclosed material divergences between the appellant and the respondent as to the custom of this particular Math, but with the possible exception of one point, these differences have been disposed of by concurrent findings of the Courts below.

There is no dispute now that Mahant Ratan was entitled to resign his office during his lifetime, and the question is (1) whether he was entitled to appoint and install his successor at his own hand, without the approval and confirmation of the

Bhek, and (2) if such approval and confirmation was necessary whether the respondent was in fact installed by Mahant Ratan with such approval and confirmation.

On the first of these two questions, the respondent pleaded and went to trial on the allegation that that approval or confirmation by the Bhek was unnecessary, but after he had closed his evidence and after the appellant had been examined, his vakil made an important admission, which was recorded, viz.

> Munshi Bahadur Lal, the plaintiff's vakil, stated that his case is this, that the plaintiff alone was installed to the gaddi and for the period of his minority his father, Hardeo Singh, superintended over him.
>
> According to custom two Mahants cannot be installed at one and the same time.
>
> Confirmation is necessary at the time of installation to gaddi of Mahantship, and the members of the Nirmala Sanghat, and Sewaks and raises are invited. Whether any of these attend or not, confirmation is completed, unless there is some objection as to the gaddinashini.
>
> But it is not necessary that that person alone who has been nominated by the Guru should be made the gaddinashin.

The Subordinate Judge stated:

> Both the parties agree that it is necessary that the fraternity should give a sort of approval at the time of the installation of a particular person as the Mahant of the Math in question. There is a definite allegation on this point on behalf of defendant 1 in the written statement, while the learned advocate for the plaintiff has also accepted it in his statement recorded on paper No. 330-C.

In reference to this statement, the learned Judges of the High Court stated:

> The natural interpretation of the admission appears to us to be that although a presiding Mahant may nominate his successor during his lifetime, it is necessary for the successor to be confirmed in the office by the members of the Nirmala Sanghat at the time of the installation; and also that it is necessary at the time of the installation of a new Mahant to invite the members of the Sanghat, who have the right on the occasion of the ceremony of either confirming or rejecting the candidate nominated. As there was some doubt in our minds as to the proper interpretation of the admission, however, we asked Mr. Bahadur Lal, who was present in Court, what he had intended to convey, and he stated that he was only referring to a case where a Mahant had nominated his successor, but not installed him during his lifetime.

The learned Judges were inclined to accept this qualification of the admission, but found it unnecessary to decide the question:

> Because we have on the facts agreed with the finding of the trial Court, that the members of the Bhek did by their acts or omissions confirm the installation.

In the opinion of their Lordships the admission of the plaintiff's vakil, as recorded, is quite unambiguous and clearly covers the installation of the respondent, his client, which is directly referred to in the first two sentences of the statement, and the appellant was thereafter entitled to proceed with the trial on that footing; the respondent's vakil should not have been permitted to qualify his clear admission.

As to the meaning of confirmation by the Bhek the Subordinate Judge states:

> It means that at the time of the installation a sufficient number of persons of the fraternity or the Bhek should be present so as to signify their general approval of the appointment of that particular chela as the Mahant of the Math.

The learned Judge, after reviewing the evidence, stated that the documentary evidence conclusively and beyond any doubt established that the respondent was installed on the gaddi by the late Mahant Ratan Singh, and that all the facts went to prove that the installation of the respondent on the gaddi on the Baisakhi day (13th April) of 1928 was followed by confirmation of the Bhek people. He referred to the evidence of four of the appellant's witnesses who stated that they were present, but thought that it was a matter of entrusting the kitchen arrangements to the respondent and his father, and added,

> but one fact becomes quite apparent that on the Baisakhi day of 1928 some function did take place in Chaitanya Math, that people had been duly informed about it and consequently they did attend it. I hold that the plaintiff has established that his installation was followed by confirmation of the Bhek or fraternity.

As already stated, the High Court concurred in this last finding, and they also held that the decision of the trial Court that the respondent was installed on 13th April 1928 was correct. In accordance with their usual practice, their Lordships would not interfere with such concurrent findings, unless there was no sufficient evidence to support them.

In the normal case of the death of a Mahant, the members of the fraternity will be fully aware of the vacancy in the office, and the usual practice will be for the installation of his successor, usually nominated by him, to take place on the seventeenth day after the death. On the other hand, when the Mahant resigns during his life and installs his successor on the gaddi, it is obvious that the fraternity should be made aware of the proposed vacancy in the office and should be given the opportunity of confirming or refusing to confirm the nominee. As regards notice of the Mahant's intentions, this is not a matter of strict formalities, and the practice of

sending a runner round with a verbal intimation, which was adopted in the present case, appears to their Lordships to meet the situation. Further in the present case, the evidence places it beyond doubt that the fraternity were fully aware of the Mahant's intentions, and the day chosen was a most important and auspicious one, being the birthday of Sikhism, which is observed as the New Year's Day in the Punjab, festivities and religious ceremonies being held in all the Gurdwaras and Sanghats.

Again, as regards confirmation by the Bhek, it does not, in their Lordships' opinion, involve anything in the nature of an election or the passing of a resolution; it is important to remember that the members of the Bhek present actually take part in the ceremony; the application of "tilak" to the forehead and the money presents made by them are a part of the ceremonies, and may well be held to establish confirmation of the person installed. In the opinion of their Lordships there was ample evidence to justify these concurrent findings, and the appeal must fail.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs, and the decree of the High Court should be affirmed.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L. Polak & Co.

Solicitors for Respondent —
Douglas Grant and Dold.

*** A. I. R. 1938 Privy Council 219**

(From Lahore : A I R 1935 Lah 150)

27th May 1938

LORDS THANKERTON, ROCHE, AND ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN

Sardar Mohammad Nawaz Khan — Appellant.

v.

Bhagata Nand (Gurdwara Committee Panja Sahib, Hassan Abdal) — Respondent.

Privy Council Appeal No. 135 of 1936.

*** Punjab Tenancy Act (16 of 1887), S. 77 (3) (j) — Suit by person for declaration that he is not liable to pay haq buha alleging that he does not come within class of people liable to pay the same — Suit comes under S. 77 (3) and Civil Court's jurisdiction is barred** : *67 P R 1905 =113 P L R 1905 and 7 Lah 173=A I R 1926 Lah 244=92 I C 1012, Overruled; 16 Lah 204= A I R 1935 Lah 150=156 I C 450, Reversed.*

If a suit is brought in the Civil Court to declare that haq buha is not a village cess within the meaning of the Act of 1887 and that the Revenue Courts have no jurisdiction in respect thereof, such a suit cannot be regarded as incompetent. On principle it is for the Civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction. Similarly the mere fact that the "dispute or matter" is one which might arise incidentally in a suit of the character mentioned in such a clause as (j) is not sufficient to exclude it from the jurisdiction of the Civil Court. But where it is found that haq buha is leviable in a village by custom and is therefore a village cess and a person brings a suit for declaration that he is not liable to pay haq buha alleging that he does not come within the class of people liable to pay the same, the jurisdiction of the Civil Court is barred as the matter in dispute is the very thing with respect to which a suit of the class described in Cl. (j) would be concerned as its subject-matter. Cl. (j) cannot be interpreted as applying only to cases where the sole dispute is as to the amount payable. What Cl. (j) characterizes is a class of claim: whether a suit comes within it or not does not depend on the defence taken to the claim. The view that the Civil Court has jurisdiction where the plaintiffs claim a declaration that though certain cesses are payable, the plaintiffs are not liable to pay by reason of not belonging to classes from which payment can be claimed, is not a sound construction or application of the terms of S. 77 (3). The claim is exactly the counterpart of the suit described in Cl. (j). To lift the plaintiff out of the category of persons liable to the tax according to the village custom is only to hold that the custom does not apply to the plaintiff or that the plaintiff is not liable for the tax : *33 P R 1908, Approved; 67 P R 1905=113 P L R 1905 and 7 Lah 173=A I R 1926 Lah 244=92 I C 1012* **Overruled** ; *16 Lah 204=A I R 1935 Lah 150= 156 I C 450*, **Reversed**. [P 221 C 1, 2; P 222 C 1, 2]

J. L. Gover and J. R. Godfrey — *for Appellant.*

P. V. Subba Rao — *for Respondent.*

Sir George Rankin. — The appellant, Sardar Mohammad Nawaz Khan, a Muslim, is the principal proprietor of village Kot Fateh Khan in the district of Attock in the Punjab. According to the wajib-ul-arz prepared at the time of the settlement of 1904 the appellant as proprietor is entitled to realize a tax or cess called haq buha (door-tax). So far as material the entry is as follows :

> Haq buha is realized annually from the kamins or non-proprietors living inside the abadi of our village at a rate ranging from Re. 1 to Rs. 2 . . . Haq buha is taken by Sardar Mohammad Nawaz Khan only.

The original dispute in the present case was whether the appellant was entitled to claim this tax from one Parkasha Nand who was the head or mahant of an old shrine called Deri Baba Than Singh situate in the village, and who has died pending the litigation. The claim is not made against the

shrine as an institution or against any mahant by reason of his office, but is a claim preferred against the individual as being a non-proprietor of the village residing therein. Chap. 7, Punjab Tenancy Act (16 of 1887) deals with jurisdiction and procedure, and the material parts of subs. (3), S. 77 therein, and of the definition section (S. 4) of the Act, are as follows :

(3) The following suits shall be instituted in, and determined by Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted :

Provided that—

(i) Where in a suit cognizable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court the Civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil P. C. and return the plaint for presentation to the Collector.

* * * *

(j) Suits for sums payable on account of village cesses or village expenses. . . . .

Section 4.—In this Act unless there is something repugnant in the subject or context:

(12) 'Village cess, includes any cess, contribution or due which is customarily leviable within an estate and is neither a payment for the use of private property or for personal service nor imposed by or under any enactment for the time being in force. . . . .

In addition to these provisions it may be noticed that the Act empowers a Revenue Court (with the sanction of the Court to which it is immediately subject) if it considers that a question is more proper for decision by a Civil Court to require any party to a proceeding in the Revenue Court to institute a suit in the Civil Court for a decision on the question (S. 98). Also that the Act empowers either Civil or Revenue Court to refer to the High Court questions as to jurisdiction (S. 99) and contains provisions enabling the High Court where a suit has been determined by a Court of the wrong class to order that the decree be registered in the Court which had jurisdiction (S. 100).

On 9th August 1925, the appellant sued Parkasha Nand in the Court of the Revenue Assistant at Attock for Rs. 28 — being two rupees for each of the 14 years 1912-25 inclusive — on account of haq buha, which the plaint alleged to be a village cess realizable from Parkasha Nand in terms of the wajib-ul-arz on the ground that he was a non-proprietor living in the abadi of the village. The claim for 14 years' arrears was said to be saved from limitation by reason of the appellant's minority. Parkasha Nand disputed that he lived in the abadi or was a non-proprietor or was within the class of persons liable to the tax or that he or his predecessors had ever paid or been asked to pay it. He also disputed the jurisdiction of the Revenue Court. On 17th November 1925, the Revenue Assistant held that he had jurisdiction, and on 5th January 1926, Parkasha Nand brought in the Court of the Subordinate Judge at Attock the suit out of which the present appeal has arisen. At that date the suit in the Revenue Court had not been decided, but Parkasha Nand referred to it in his plaint and asked for a declaration from the Civil Court that he was not liable to pay haq buha. After unsuccessful endeavours by him to obtain a stay of proceedings in the Revenue Court, judgment therein was given on 13th June 1927. The Revenue Assistant held that the custom was valid, old and uniform and that Parkasha Nand was a non-proprietor, having a particular house as residence in the village: he also believed the evidence of a number of old sadhus connected with the shrine to the effect that previous mahants had paid the tax, and held that there was no evidence to prove that Parkasha Nand was exempt. An appeal was taken to the Collector from this decision, but before that appeal was decided, the Subordinate Judge, on 25th November 1927, having refused to stay the civil suit, gave judgment against Parkasha Nand upon the merits, holding that haq buha was a customary cess and that Parkasha Nand was liable to pay it; but finding that neither he nor his predecessors had paid it in the past. In the next month (9th December 1927), the Collector dismissed his appeal from the Revenue Assistant, holding that haq buha was a village cess and that it had been paid in the past by previous mahants. Parkasha Nand, having appealed to the District Judge against the Subordinate Judge's dismissal of his suit for a declaration, died while this appeal was pending and one Bhagta Nand was appointed by the District Judge (10th September 1928), to be the appellant's representative for the purposes of the appeal.

On 24th December 1928, the District Judge dismissed the appeal, holding that the Civil Court's jurisdiction was ousted by sub-s. 3, S. 77 of the Act of 1887 and that in any case the matter was res judicata by reason of the decision of the Revenue Courts. On the merits he rejected the

contention that Parkasha Nand was not a non-proprietor or was not resident in the village, but he held that neither Parkasha Nand nor any predecessor of his had ever paid haq buha; and that the custom did not apply to a person holding so peculiar a position as the mahant of the shrine. From this decree a second appeal was preferred by Bhagta Nand to the High Court at Lahore : this was heard and dismissed by Johnstone J. on 28th October 1930, on the ground that the suit was not cognizable by a Civil Court. A Letters Patent Appeal having been brought by leave of the learned Judge to a Division Bench, Tek Chand and Monroe JJ., on 16th May 1934, reversed all the previous decrees in the suit, held that the suit was within the jurisdiction of the Subordinate Judge; and as the District Judge had found as a fact that the village custom did not apply to a mahant of the shrine, held that the suit for a declaration must succeed. Thereafter this appeal to His Majesty was brought by special leave from the decree of the Division Bench and by an order of the High Court dated 6th April 1936, the Gurdwara Committee, Panja Sahib, was appointed to contest the appeal in place of Bhagta Nand for reasons to which their Lordships see no need to refer.

Mr. Gover in his argument for the appellant took two points : (1) that the suit brought in the Court of the Subordinate Judge for a declaration that the appellant was not entitled to demand any amount from Parkasha Nand as haq buha was one of which that Court was forbidden to take cognizance by the terms of sub-s. (3), S. 77 above quoted; (2) that the matter was concluded by the decision of the Revenue Court — that is res judicata. Their Lordships do not find it necessary to deal with the second point. On the first point their Lordships are of opinion that the appellant's contention is right, but they will preface their decision by stating that had the suit brought in the Civil Court been a suit to declare that haq buha was not a village cess within the meaning of the Act of 1887 and that the Revenue Courts had not jurisdiction in respect thereof, such a suit could not have been regarded as incompetent. On principle it is for the Civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction and no statutory provision to the contrary has been drawn to their Lordships' attention in the present case. It is however found or assumed by all the Courts in the present case that haq buha is leviable in this village by custom and is therefore a village cess: Johnstone J. in his judgment states that in his Court this was agreed and the Division Bench clearly proceeded on that view.

Haq buha being a village cess, S. 77 not only requires that a suit to recover sums payable on account thereof should be brought in the Revenue Court but forbids any other Court to take cognizance of "any dispute or matter with respect to which any such suit might be instituted." Their Lordships see no way of interpreting these words which would exclude from their scope the question of the liability of Parkasha Nand or any other person to pay the cess. His suit was not a "suit for a sum payable" within Cl. (j) because it was a suit for a declaration negativing his liability, but it raised a matter with respect to which a suit under Cl. (j) might have been instituted. The purpose of the prohibition in sub-s. (3) is to prevent claims which are intended to be decided by the Revenue Court being in effect carried before the Civil Court by altering the form in which the matter is raised. As many matters are brought under sub-s. (3), S. 77, it is important to notice that the mere fact that the "dispute or matter" is one which might arise incidentally in a suit of the character mentioned in such a clause as (j) is not sufficient to exclude it from the jurisdiction of the Civil Court. For example, the ordinary suit in the Civil Court for declaration of title to immovable property would not become incompetent merely by reason that one consequence of the plaintiff getting a decree would be that as a proprietor he could not be charged with village cess. In such a title suit the "dispute or matter" of the action would not be the question of the plaintiff's liability to village cess. Of the present case it is clear that the matter in dispute is the very thing with respect to which a suit of the class described in (j) would be concerned as its subject-matter. Their Lordships are in agreement with the Full Bench decision of the Chief Court of the Punjab in 33 P R 1908.[1] The claim (according to the report) was for a declaration that the plaintiffs as occupancy tenants were not liable to pay haq buha and Robertson J., delivering the judgment of the Court, observed :

1. Gamu v. Karim Khan, (1908) 33 P R 1908= 171 P L R 1908=83 P W R 1908 (F B).

Liability for the payment of a cess alleged to exist in the village is the subject matter of the dispute and the dispute or matter is one in regard to which a suit could be brought under S. 77 (3) (j). We think that a suit like the present for a declaration is of the same nature as a reply to a suit under S. 77 (j), which suit is clearly triable by a Revenue Court ; and the mere fact that the form of the suit is one for a declaration that the cess is not payable, instead of an assertion that a definite sum is payable by way of cess, does not alter its character, or give the Civil Courts jurisdiction, when the dispute or matter itself is clearly one as to which a suit could be brought under S. 77 (3) (j).

This principle was not followed in the present case by the learned Judges who heard the Letters Patent Appeal, partly because of other decisions but chiefly because the Full Bench found in a case which had been previously decided by one of its members, 67 P R 1905,[2] a distinction which they deemed to be applicable to the present case. In that case the Civil Court had been held competent to entertain a suit for a declaration that certain village dues were recoverable only from kamins who construct houses on land belonging to proprietors and that the plaintiffs as owners of their houses and cultivators were not liable therefor. The learned Chief Judge considered that "the dispute must be closely allied to the suit, in this case a suit for a sum payable" and that this could not be said of a suit for a declaration that the plaintiffs "shall be lifted out of a category affected by a clause in the wajib-ul-arz under which they are liable to pay kamiana". The Division Bench in the present case regarded the Full Bench decision as explained by the fact that the plaintiffs in the Full Bench case had asked for a declaration that haq buha was not leviable at all in the village—a circumstance which they discovered from the record. Their view was that the Civil Court has jurisdiction where the plaintiffs claim a declaration that though certain cesses are payable the plaintiffs are not liable to pay by reason of not belonging to classes from which payment can be claimed. Their Lordships cannot accept this as a sound construction or application of the terms of S. 77 (3). If the Revenue Court is the only Court competent to try a suit for a declaration that no haq buha is leviable at all in the village, it is impossible to hold that the Civil Court can try a suit for a declaration that the plaintiff is not a member of the class liable therefor. The latter claim is more exactly the counterpart of the suit described in Cl. (j) than the former, but both are suits which have for their subject-matter the liability of the plaintiffs for the cess. To lift the plaintiff out of the category of persons liable to the tax according to the village custom is only to hold that the custom does not apply to the plaintiff or that the plaintiff is not liable for the tax. The decision in 67 P R 1905[2] is in their Lordships' view open to the criticizm that it permitted the fact that the plaintiff's suit was for relief of a very different kind from that mentioned in Cl. (j) to obscure the fact that what the Act calls " the dispute or matter" was the same in both. A suit to take the plaintiff out of any other category than that defined by a custom as to village cesses or expenses would not be rendered incompetent by the section so far as Cl. (j) is concerned ; and if the suit was not a suit about the custom or the plaintiff's liability under the custom, it would be equally competent notwithstanding that the plaintiff's rights in the subject-matter of the suit depended upon his proving something which would be inconsistent with his being liable under the custom. After all, the same "category" may be employed for many different purposes. Their Lordships are of opinion that 67 P R 1905[2] and the cases which follow it (e. g. 7 Lah 173[3]) should be overruled.

It was suggested in argument for the respondents that Cl. (j) must be interpreted as applying only to cases where the sole dispute is as to the amount payable, but this is not consistent with the language of the statute or with the decisions. What Cl. (j) characterizes is a class of claim : whether a suit comes within it or not does not depend on the defence taken to the claim. Their Lordships think it convenient to notice that the sole question before the Civil as before the Revenue Court was the liability of Parkasha Nand, deceased, to pay the cess in his lifetime. Neither the shrine nor the office of mahant nor any successor or Parkasha Nand was a party to either suit or is bound by the result. If in the future any claim for the cess be made against a successor of Parkasha Nand it will presumably be against him personally and as an individual, and he will not be precluded from contesting it anew. In view of the divergence of opinion disclosed by the present case upon the question whether a

2. Seikh Muhammad v. Habib Khan, (1905) 67 P R 1905=113 P L R 1905.

3. Singh Ram v. Kala, (1926) 13 A I R Lah 244 =92 I C 1012=7 Lah 173=27 P L R 70.

mahant of such a shrine as Deri Baba Than Singh is within the custom of this village, any Revenue Court will doubtless scrutinize the evidence as to the scope of the custom with especial care, unless indeed it sees fit to use its powers under S. 98. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the suit dismissed with costs throughout.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellant —
Sharpe Pritchard & Co.

Solicitors for Respondent —
Hy. S. L. Polak & Co.

A. I. R. 1938 Privy Council 223

(From Rangoon)

12th May 1938

LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN

Maung Po Hla and another —
Appellants.

v.

Ma Ngwe Sint and others —
Respondents.

Privy Council Appeals Nos. 47 and 74 of 1937.

Mortgage—Mortgage of paddy land — Mortgagor alleging discharge of debts by delivery of paddy to mortgagee's mills— On considering evidence loan held made to enable mortgagor to procure and deliver paddy to mortgagee's mills — Mortgage held discharged by delivery of paddy.

In suits on mortgage of paddy land the defence was that the mortgage debts had been paid off by the supply of paddy to the mortgagee's rice mills. The mortgagor said that the loans were made by the mortgagee to enable mortgagor to obtain and deliver paddy to be milled by the mortgagee. The mortgagee's case was that the monies lent by him were lent as an investment upon a high rate of interest and upon security of the land :

Held that for the purpose of estimating the probabilities of the case local knowledge was particularly important. Upon a careful examination of the evidence their Lordships thought it proved that paddy was delivered to the mortgagee's mills as alleged by the mortgagor and that the loans were not made by the mortgagee merely as an investment upon the security of the land. The purpose of the loans was to enable the mortgagor to procure and deliver paddy to the mortgagee's mills. It was for the mortgagor to prove that the loans were repaid, but if the evidence given on his behalf be accepted as true, the burden had been discharged notwithstanding that more business-like methods would have enabled him to give better proof. [P 224 C 1, 2]

A. M. Dunne and R. W. Leach — *for Appellants.*

A. Pennell — *for Respondents.*

Sir George Rankin. — In this case two appeals from the High Court at Rangoon have been consolidated. They arise out of two mortgage suits brought by the appellants in the District Court of Pyapon. In each suit there were three defendants— two of whom were impleaded in both suits. In Appeal No. 47, the mortgage sued upon was a sub-mortgage of some 125 acres of paddy land in Pyapon township to secure a loan of Rs. 7000 with interest at 18 per cent. per annum. In Appeal No. 74 the mortgage sued upon was of four pieces of paddy land in the same township to secure a loan of Rs. 13,000 with interest at 16½ per cent. per annum. These mortgages were effected by registered deeds both dated 23rd September 1924. The appellants' suit to enforce the sub-mortgage was brought on 19th June 1933, and their suit upon the other mortgage on 23rd January 1934. The suits came on for hearing in October 1934 and October 1935, respectively, before different Judges in the same District Court and in each case the plaintiffs succeeded at the trial in obtaining a preliminary decree for sale on the footing that the whole of the loan and of the interest due under the mortgage deed was due and unpaid. On appeal to the High Court these decrees (dated 31st October 1934 and 9th October 1935) were set aside and both suits were dismissed on the ground that the whole of the debt and of the interest had in each case been satisfied and discharged before the suit was instituted. The ultimate decision of the High Court (Mya Bu and Baguley JJ.) in the case upon the sub-mortgage was given on 18th August 1936, after an application for review had been allowed. The result of the review was to confirm the Court's original decree of 14th November 1935, dismissing the suit. In the case upon the other mortgage there was a difference of opinion between the two learned Judges of the Appellate Bench (Mackney and Mya Bu JJ.) and the case was under Cl. 34 of the Letters Patent of the Court laid before Mosely J., who agreeing with Mya Bu J., allowed the appeal and dismissed the suit.

The defence which has been accepted in both suits by the High Court is that the mortgage debts had been paid off by the

supply of paddy to the plaintiffs' rice mills. The mortgagors in the case of the sub-mortgage were Sein Su and his mother : in the case of the other mortgage Sein Su, his mother and his brother Sein Kar. The plaintiffs Po Hla and Po Cho are Chinese brothers who owned rice mills at and near Rangoon. The defendants say that the loans were made by the plaintiffs to enable the defendants to obtain and deliver paddy to be milled by the plaintiffs. The High Court has accepted the defendants' evidence in respect of the following deliveries the value whereof has, in the opinion of the High Court, been proved to exceed the sums due upon the mortgages in suit :

2515 baskets of Ngasein paddy on 28th September 1924.

2267 baskets of Ngasein paddy on 29th October 1924.

5006 baskets of Kauknyin paddy in October 1925.

4000 baskets of Midon paddy in December 1927.

The defendants say that they have from time to time endeavoured to get the plaintiffs to come to a settlement as to the exact sums due in respect of these deliveries and they produce accounts purporting to show the cost to the defendants of these consignments. The plaintiffs' case is that the monies lent by them were lent as an investment upon a high rate of interest and upon security of the land : though no doubt the defendants wanted the money to trade with. The plaintiffs have been in possession throughout of the mortgage deeds and no receipt for any principal or interest has, at any time, been given or indorsed thereon. Upon the question of the deliveries of paddy the plaintiffs produce no accounts saying that their practice is to destroy their accounts after three years. The plaintiffs do not deny that paddy was at times delivered to their mills by the defendants, but say that the transactions were settled at the time. This the defendants deny save that it is agreed that Rs. 1000 was paid at the time of delivery on account of the sum due in respect of the 4000 baskets of Midon paddy.

The controversy is clearly one of fact. It has given much difficulty to the Courts in Burma : the two District Judges and Mackney J. being in favour of the plaintiffs, while Mya Bu, Baguley and Mosely JJ. were in favour of the defendants. For the purpose of estimating the probabilities of the case local knowledge is particularly important : and the learned Judges of the High Court at Rangoon are in this respect specially qualified—in some cases by long experience of the paddy market in Burma ; whereas the habits and business methods of Chinese rice millers and of Burman cultivators are matters upon which their Lordships have no special means of knowledge. Upon a careful examination of the evidence, their Lordships are not prepared to dissent from the conclusions arrived at by the High Court. They think it proved that paddy was delivered to the plaintiffs' mills as alleged by the defendants, and they do not accept the contention that the loans were made by the plaintiffs merely as an investment upon the security of the land. They agree with the majority of the Judges in the High Court in thinking that the purpose of the loans was to enable the defendants to procure and deliver paddy to the plaintiffs' mills. They think that the sub-mortgage was not at all a likely choice on the part of the plaintiffs if they were merely seeking an investment, and that it is improbable that the plaintiffs should have settled with the defendants in respect of transactions in paddy without retaining anything in respect of the interest due upon the mortgages. The plaintiffs' explanation of the absence of all accounts—that their practice is to destroy all accounts after three years — cannot in their Lordships' opinion be readily accepted. It is for the defendants to prove that the loans were repaid, but if the evidence given on their behalf be accepted as true, the burden has been discharged notwithstanding that more business-like methods would have enabled them to give better proof. While the case presents some difficulty their Lordships think that the reasons given by the High Court, and in particular by Mosely J. who was the last Judge to deal with the matter are sufficient to justify the decrees appealed from. They will humbly advise His Majesty that the appeals should be dismissed with costs.

D.S./R.K. *Appeals dismissed.*

Solicitors for Appellants — Gardhyell & Co.

Solicitors for Respondents — J. E. Lambert.

A. I. R. 1938 Privy Council 225

(From Ceylon)

27th May 1938

LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Carson & Co. Ltd.—Appellant.

v.

Dorothy Margaret Catherine Hulme-King — Respondent.

Privy Council Appeal No. 42 of 1937.

(a) Bond—Construction—Clause in bond that stated account of balance in writing and signed by directors conclusive proof — Directors held not entitled to bring within bond indebtedness not covered by it.

A clause in a bond provided as follows : " . . . and also any balance of account which may be found due by the said obligor to the said company and of which said balance a stated account in writing made out of the books of the said company signed and certified by the directors for the time being of the said company shall be sufficient at law and conclusive proof without any other document or voucher to support the same" :

Held such a clause could not entitle the directors to bring an indebtedness not covered by the bond within the bond. [P 226 C 2]

(b) Deed — Construction—Stamp duty paid on mortgage bond in respect of certain amount —Mortgagee cannot contend that real amount due under bond is larger.

A person who has paid stamp duty on a bond on the footing that it was only for a certain existing debt, cannot afterwards be heard, by maintaining another construction, to say that the real amount was larger and to thereby admit that the revenue was defrauded of the duty on the excess. [P 228 C 1]

Harold Murphy, L. M. D. deSilva and Clive Bert — *for Appellant.*

Stephen Chapman — *for Respondent.*

Lord Thankerton. — The present suit was instituted by the appellant for recovery of a sum of Rs. 60,730/57 and interest as due under mortgage bond No. 189 dated 23rd July 1930, executed by the respondent in favour of the appellant. By decree dated 25th June 1935, the District Court of Colombo entered decree awarding the appellant the said sum and interest. On appeal, this decree was amended by the decree of the Supreme Court of Ceylon dated 5th February 1937, so as to award the sum of Rs. 10,504/79 with interest to the appellant, who now appeals against their decision, and asks that the decree of the District Court should be restored. It is agreed that the difference between the sums awarded respectively by the District Court and the Supreme Court is represented by a sum of Rs. 43,278/52, which the appellant claims to be recoverable under the mortgage bond, and which the respondent denies to be so recoverable. The determination of the dispute depends partly on the proper construction of the bond, and partly on the true view of the somewhat unusual circumstances which surrounded its execution. For some time prior to July 1930 the respondent, who owned estates in the Island, had employed the appellant to manage them. The appellant appears to have been in the habit of making remittances to her from time to time, in anticipation of the receipt of the income from the estates, which was mostly derived from the production and sale of rubber and copra. These advances appear to have been so far financed by the appellant by an overdraft account with its bank in its own name. The serious depreciation in the prices of rubber and copra and the large amount of the respondent's indebtedness led the appellant in June 1930, to ask the respondent to give it real security for the debt. At this time the respondent was absent from the Island, and Mr. P. G. Cooke, a proctor, who held her power of attorney, represented her. Through Mr. Cooke, the respondent agreed to grant a secondary open bond over her Dicklande estate, and on 23rd July 1930, the mortgage bond, here in question, was signed by Mr. Cooke as her attorney, and it was registered on 26th July 1930.

It is an established fact that on 22nd July 1930, prior to the transactions about to be referred to, the defendant was indebted to the appellant in the sum of Rs. 53,783/31, of which Rs. 10,504/79 had been financed by means of the appellant's overdraft from the bank. On the suggestion of Mr. Cooke, conceived doubtless in the respondent's interest, an arrangement was made between him and the appellant, with the sole view of reducing the amount of stamp duty to be paid on the mortgage bond. This arrangement is not stated in writing, but it was spoken to in the evidence of Mr. Matthews, the accountant of the plaintiff company, and by Mr. Cooke, and the carrying out of the arrangement is evidenced by certain documents.

It will be convenient to state at once the contentions of the appellant before their Lordships; they were as follows : (1) That by the carrying out of the arrangement the respondent's debt to the appellant was discharged to the extent of Rs. 43,278/52 prior to the execution of the mortgage bond on 23rd July 1930. That the bond

only covered the balance of Rs. 10,504/79, so far as existing debt was concerned. That, on 25th July 1930, a further advance of Rs. 43,278/52 was made by the appellant to the respondent, which was covered by the bond as a future advance; and that it was rightly included in arriving at the balance sued for; (2) alternatively, if it were held that the appellant's debt was not so discharged to the extent of Rs. 43,278/52 prior to the execution of the bond, that it was covered, as existing debt, by the terms of the bond, and was rightly included in arriving at the balance sued for; (3) that, apart from the foregoing contentions, the balance sued for, being signed and certified by the directors as provided in the bond was sufficient at law and conclusive proof of the respondent's liability under the bond without any other document or voucher to support the same, as provided in the bond.

The material portions of the mortgage bond are as follows :

And whereas the said obligor is indebted unto Carson and Company Limited a Company duly incorporated under the Ceylon Joint Stock Companies Ordinances and having its registered office at the Australia Buildings in the Fort of Colombo aforesaid (hereinafter sometimes called and referred to as the said company which term or expression as herein used shall where the context so requires or admits mean and include the said Carson & Co. Ltd. its successors and assigns) in the sum of Rs. 10,504/79 of lawful money of Ceylon.

And whereas the said obligor has requested the said Company to lend and advance to her such further sum and sums of money as the said Company may in its absolute discretion think fit which the said Company has agreed to do on the said obligor entering into and executing these presents and giving and granting the security hereinafter mentioned.

Now Know Ye and these presents Witness that the said obligor doth hereby for herself and her heirs, executors and administrators covenant and agree with and bind and oblige herself, her heirs, executors and administrators to the said Company that she the said obligor and her aforewritten shall and will on six calendar months' notice in writing being given to her or her aforewritten well and truly pay or cause to be paid in Colombo aforesaid to the said Company all and every the sums and sum of money now due owing and payable and which shall or may at any time and from time to time and at all times hereafter be or become due owing and payable to the said Company by the said obligor upon or in respect of any loans and advances or payments made or to be made by the said Company to or for the use or accommodation or on account of the said obligor or upon or in respect of any account or transactions whatsoever between the said obligor and the said Company or upon or in respect of any overdraft obtained by the said Company for and on behalf of the said obligor together with interest thereon at the rate of eight per cent. per annum from the date or respective dates of such payments or advances and also any balance of account which may be found due by the said obligor to the said Company and of which said balance a stated account in writing made out of the books of the said Company and signed and certified by the Directors for the time being of the said Company shall be sufficient at law and conclusive proof without any other Document or Voucher to support the same.

The last contention of the appellant may be disposed of first, and it is enough to say that the stated account in writing bringing out the balance sued for, which is certified by seven directors of the appellant company, shows on the face of it that the indebtedness of Rs. 43,278/52, which is in question, is taken into computation, and, if that indebtedness is not covered by the bond, such a clause cannot entitle the directors to bring it within the bond. Accordingly the third contention fails. The appellant's main contention however was the first one, and it is necessary to consider carefully the steps taken to secure reduction of the stamp duty, in order to see whether they effected at the same time the discharge of the defendant's indebtedness to the extent of Rs. 43,278/52. The appellant's case is that, under the arrangement made with Mr. Cooke, the appellant advanced to Mr. Cooke personally the amount necessary to discharge the respondent's indebtedness to the appellant to the extent of Rs. 43,278/52, and that Mr. Cooke did so discharge the respondent's indebtedness by a cheque drawn against the said advance; that this was done prior to the execution of the bond; that, on 25th July 1930, after the execution of the bond, the appellant, on Mr. Cooke's instructions, made a fresh advance of Rs. 43,278/52 to the respondent, which was used to discharge Mr. Cooke's indebtedness to the appellant. The evidence may now be examined to see what the reality of this transaction, which admittedly resulted in stamp duty being paid on the footing that the existing debt of the respondent was Rs. 10,504/79, was in a question between the appellant and the respondent. On 22nd July 1930, the day before the execution of the bond, the appellant and Mr. Cooke exchanged cheques. In the first place, the appellant wrote Mr. Cooke a letter the material part of which is as follows :

Dear Sir,

Mrs. Daisy Hulme-King.

We have pleasure, as arranged, in handing you cheque in favour of the above for Rs. 45,278/52 and shall be glad to receive your cheque for a like amount in due course.

The cheque was drawn on the National Bank of India, Colombo, in favour of "Mrs. Daisy Hulme-King" or order, and it will be noted that it was for an amount exceeding the indebtedness in question by Rupees 2000. The cheque was evidently endorsed by Mr. Cooke, as the defendant's attorney, with the addition of "Please credit my a/c. P. G. Cooke" and presented to the Bank. From a note "Payee's endorsement required 22.7.30.", it may be inferred that the Bank declined to accept the attorney's endorsement in his own favour and returned the cheque. The original payee's name was then deleted and replaced by "P. G. Cooke" as the payee, and the alteration initialled by the drawers, and the original endorsement and its addition, and the Bank's memorandum were all deleted. The cheque was then endorsed by Mr. Cooke in his own name. It may be assumed from the word "transfer" marked on the cheque that it was again presented to the Bank, but there is no information as to the day on which it was presented. On the same day, 22nd July, Mr. Cooke wrote to the appellant enclosing a cheque "in your favour for Rs. 45,278/52 in settlement of the amount due to you by Mrs. Daisy Hulme-King, the receipt of which kindly acknowledge". This cheque was also drawn on the National Bank of India, Colombo, and was signed by Mr. Cooke personally. It was endorsed to the Bank by the appellant, and is marked by the Bank as paid on 25th July, two days after the execution of the bond. The appellant's letter to Mr. Cooke acknowledging receipt of this cheque is dated 24th July, the day after the execution of the bond. It will be noticed that it is also in excess of the indebtedness by Rs. 2000. That completes the documentary evidence as to the alleged discharge of the indebtedness in question. There remains the evidence of Mr. Matthews and Mr. Cooke. Mr. Matthews did not speak to this matter in his examination-in-chief, but in cross-examination he stated:

My accounts show payments to Mr. Cooke of Rs. 24,339/50 and 18,939/02. In fact there was only one cheque. That sum of Rs. 45,000 we paid to Mr. Cooke at his request on 22nd July. He requested us to send that amount to him and he would before the signature to the bond send us a cheque squaring off the amount due to Carsons by the defendant. Mr. Cooke sent us cheque on 22nd July itself. I presume the object was to reduce the amount on the bond to evade stamp duty. We received a cheque from Mr. Cooke which was credited to defendant's account. Later the position of the account of the defendant was squared. Mr. Cooke wrote to us. His instructions were to transfer Rs. 43,000 to debit of the defendant and credit Mr. Cooke in Carsons' books.

To Court: "I gave a cheque for Rs. 45,000 to Mr. Cooke as a loan to him personally. He paid it back by instructing us to debit the defendant with these various amounts and credit him . . . . We entered into this manipulation at defendant's request. As a result of our agreeing to it we took a bond for Rs. 10,504/79 and now seek to charge the extra Rs. 43,278/52 after the execution of the bond. We regard it as a future advance but we received instructions from Mr. Cooke to credit his account and debit the defendant. It was a repayment of the amount that Mr. Cooke had borrowed on account of the defendant."

To Court: "Rs. 45,000 is paid by Mr. Cooke as an advance on behalf of the defendant. We do not credit or debit defendant's account with Rupees 45,000. This transaction did not pass through the cash book. She was temporarily credited with Rs. 43,000 but once the bond was there we restored the debit. We credited her with Rs. 45,000 in the books. After the bond was executed we restored the debit of Rs. 43,000. We made the entry on 5th August."

Re-examined: "The cheque which was acknowledged by p. 27 (letter of 24th August) was sent to the credit of our bank account and realized on 25th July. Mr. Cooke's instructions to us were that the cheque was to be credited to Mrs. Hulme-King's account. In pursuance of the instructions of Mr. Cooke we credited Rs. 43,278/52 to defendant's account. I produce an abstract from the cash book page 28 they credited that under date 25th July 1930. Subsequently we were told by Mr. Cooke to credit his account with Rs. 43,278/52 and to debit Mrs. Hulme-King. That resulted in Rs. 24,339/50 and 18,939/02 shown in p. 1 under the date 25th July 1930. These instructions were given to me expressly by Mr. Cooke as attorney for the defendant. So far as I know Mr. Cooke's object was to pay the stamp duty on a reduced basis."

This evidence, loose as to both dates and amounts, seems to prove, so far as it goes, that the appellant, though it received Mr. Cooke's cheque on 22nd July took no steps to acknowledge it, or act on it, or to alter the amount of the defendant's indebtedness as standing in its books, until 24th July after the execution of the bond. It further makes clear that the appellant throughout accepted the instructions of Mr. Cook as given in his capacity as the defendant's attorney. It is enough to cite two passages from the evidence of Mr. Cooke, viz:

To Court: "Carsons gave a cheque for Rs. 45,000 as a personal loan to me. If they gave it to me on behalf of Mrs. Hulme-King her indebtedness would have increased. In their books I understand I was debited with that amount. I considered for the moment that I was indebted to Carsons in Rs. 45,000. I paid Carsons Rs. 43,000 odd due to them by defendant 1 so that her indebtedness was Rs. 10,000 odd subject to my drawing money later on, so that I could get the bond drawn on the footing that Rs. 10,504/79 was the money to be lent. Afterwards when she was redebited with

Rs. 43,278/52 her account rose, on the understanding that the money was to be appropriated by Carsons in view of the money I had borrowed. I was saving my own principal Rs. 600 or 700.

Re-examined : "It was never intended that the result of the arrangement was to wipe out Rupees 43,278/52 of the defendant's liability."

To Mr. Pereira : "I did not get the difference of Rs. 2000. I do not know what happened to the difference of Rs. 2000 or how it was applied."

In their Lordships' opinion, this evidence makes it clear that the only reality about the transaction was the reduction in stamp duty, that it was never intended that the appellant should have recourse against anyone except the respondent for the Rs. 43,278/52, and that, in any event, the evidence does not sufficiently prove that the defendant was—even temporarily —discharged of that indebtedness. Accordingly the main contention of the appellant fails. The remaining contention of the appellant—the second one—is that, assuming that the indebtedness in question was not discharged, it was covered by the terms of the bond. While, on construction, their Lordships are inclined to the view that the terms of the bond show that "all and every the sums and sum of money now due owing and payable" is confined to the sum of Rs. 10,504/79 referred to in the narrative of the bond, it is unnecessary to decide this question, for their Lordships are clearly of opinion that the appellant, having paid duty on the bond on the footing that it was only for Rs. 10,504/79 of existing debt, cannot now be heard, by maintaining another construction, to say that the real amount was larger and to thereby admit that the revenue was defrauded of the duty due on the excess. Their Lordships should add that the only question before them was whether the Rs. 43,278/52 was covered by the bond. In answer to a question by their Lordships, the appellant's counsel stated that he did not raise any question of the defendant's personal liability apart from the bond. Their Lordships are therefore of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed with costs, and that the judgment and decree of the Supreme Court dated 5th February 1937 should be affirmed.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Stephenson Harwood & Tatham.

Solicitors for Respondent—O. A. Cayley.

A. I. R. 1938 Privy Council 228

(From Bombay)

17th June 1938

LORD THANKERTON, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Nathu Ramu Mahajan and others — Appellants.

v.

Gangabai — Respondent.

Privy Council Appeal No. 58 of 1936.

Hindu Law—Will—Construction — Guiding principles explained.

The Hindu law, no less than the English law points to the intention as the element by which Courts are to be guided in determining the effect of a testamentary disposition ; nor is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption : *6 M I A 526 (P C)*, *Rel. on.* [P 229 C 1]

Where a will provided that a widow in default of her adoption under certain conditions was to enjoy the estate for a lifetime and manage it in consultation with a person *A*, then if the widow does not adopt accordingly, she is entitled to take possession of estate and enjoy its income and if that particular person *A* dies, she is not bound to consult the executors of *A* in managing the estate. [P 229 C 2]

P. V. Subba Row — *for Appellants.*

Sir Thomas Strangman, Sir Hari Singh Gour and C. Bagram — *for Respondent.*

Sir Shadi Lal. — This appeal arises out of an action brought by the respondent, Gangabai, for the recovery from her brother-in-law, Ramu Ganpat, of the possession of her husband's estate ; and also for an account of the management of that estate. The husband, Dhanaji Dula Mahajan, died on 24th June 1907, leaving a will made by him on 21st June 1907. The Courts in India have concurred in holding that the will propounded in this case was duly made by the testator ; and that he had, at that time, a disposing mind. It appears that after the death of her hus-

band, Gangabai and Ramu Ganpat, took possession of the estate, but that the latter alone was in charge of its management. He however fell out with his sister-in-law, with the result, that she brought the present suit as stated above. The trial Court dismissed the suit, but against the decree dismissing her claim, Gangabai, preferred an appeal to the High Court. During the pendency of the appeal Ramu Ganpat died, leaving only minor children; and the executors appointed by him to administer his own estate were impleaded in the appeal as his legal representatives. The learned Judges of the High Court have decided that "the plaintiff is entitled to have an account from the date of the notice in 1927"; and have also directed the executors to deliver possession of the property claimed by her. From the decree granted by the High Court the executors have brought this appeal to His Majesty in Council; and the question which requires determination is whether the widow is entitled to obtain possession of the estate left by her husband. The answer to this question depends upon the construction of the will made by him. In determining the construction, what the Court has to look to, is the intention of the testator.

The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption: 6 M I A 526[1] at pp. 550 and 551.

In view of these principles, their Lordships have to decide what was the intention of the testator as gathered from the language used by him in his will. Now, the language of the will leaves no doubt that the testator was anxious that his estate should devolve upon the members of his family or on his brother Ramu Ganpat. He had no male issue, but his wife Gangabai was enceinte. He directed that if a son was born to him, he would succeed to his entire estate. But if she did not give birth to a son, or the son, if born, died issueless, he authorized her to adopt a boy, but the boy to be adopted should be a son of Ramu Ganpat. Indeed, she was forbidden to adopt any other boy. Now, Gangabai neither gave birth to a son, nor availed herself of the authority conferred upon her by her husband to adopt a boy. There was therefere no son, natural or adopted, who could succeed to the estate. This contingency was foreseen by the testator, who provided in the will that if Ramu Ganpat "has no such son as can be given in adoption, or if Gangabai does not take any boy in adoption, then Gangabai should enjoy the income of my estate during her lifetime." And it was only after her death, that Ramu Ganpat was to get the estate as "full owner". On the death of her husband the widow along with Ramu Ganpat actually took possession of the estate, as the will directed her to "carry on administration in respect of the property in consultation with Ramu Ganpat". Indeed, she allowed him to manage the estate; and probably she would not have brought her action to dispossess him, if he had not quarrelled with her.

As the will gave her the right to "enjoy" the income of the estate during her lifetime, it was evidently contemplated that she should, as provided by the Hindu law in the case of a widow, be in possession of the estate and realize its income. She was, no doubt, to consult Ramu Ganpat in managing the estate, but he died during the pendency of the appeal, and his executors have no right to represent him in the management. Nor is there any provision in the will associating any other person with her in carrying on the management. For these reasons their Lordships consider that the widow is, in the circumstances, entitled to the possession of the estate and also to manage it. They will therefore humbly advise His Majesty that the judgment of the High Court should be affirmed and that this appeal should be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Harold Shephard.

Solicitors for Respondent —
T. L. Wilson & Co.

1. Sreemutty Soorjeemoney Dossee v. Denubundoo Mullick, (1854-57) 6 M I A 526=4 W R 114=1 Suther 291=1 Sar 583 (P C).

A. I. R. 1938 Privy Council 230

(From Patna)

17th June 1938

LORD THANKERTON, LORD ROMER AND SIR SHADI LAL.

Raja Shyam Sunder Singh and others — Appellants.

v.

Kaluram Agarwala and others — Respondents.

Privy Council Appeal No. 3 of 1937; Patna Appeal No. 35 of 1935.

(a) Admission—Waiver—Difference between, explained.

There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for if he does not choose to enquire beforehand, he takes the risk of error. [P 231 C 2]

(b) Execution—Sale proclamation—Waiver of necessity of fresh proclamation—Defects in old proclamation regarded as waived—Objections to attachment are not however waived.

The waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation would not imply a waiver of the right to object to any irregularities in the attachment: *3 I A 230 (P C), Rel. on.* [P 231 C 2; P 232 C 1]

(c) Attachment — Purpose is to prevent transfer.

Main purpose of attachment is to prevent the transfer or charging of the property attached by the judgment-debtor. [P 232 C 1]

J. M. Pringle — *for Appellants.*

P. E. Pugh and W. Wallach — *for Respondents.*

Lord Thankerton.—Appellant 1 whose property has been sold in execution, and the other two appellants, who are receivers in charge of his properties, appeal in an application by them under O. 21, R. 90, Civil P. C., to have the execution sale set aside, against the decree of the High Court of Judicature at Patna dated 27th November 1935, which confirmed the sale, setting aside the order of the Subordinate Judge of Dhanbad dated 18th September 1933, which had set the sale aside. Under Rule 90 it is necessary, in order to have the sale set aside to prove (a) material irregularity or fraud in publishing or conducting the sale, and (b) that the applicant has sustained substantial injury by reason of such irregularity or fraud. Respondent 3 is the representative of his father, who obtained an ex parte decree dated 31st July 1931, in the High Court of Judicature at Fort William in Bengal against appellant 1 for the payment of Rs. 38,392-4-8, which was transferred to the Court of the Subordinate Judge of Dhanbad for execution, application being there made by the decree-holder on 23rd September 1931, for execution by attachment and sale of two of the said appellant's properties. The Subordinate Judge states the subsequent proceedings as follows:

The first property as described in the execution petition is Pandra 1st Kismat, touzi No. 21 of Manbhum Collectorate, pargana Pandra, the total land revenue payable being Rs. 107-2-6½ and the local cess payable for the property being Rupees 4184-10-0. The other property is Pandra 3rd Kismat, touzi No. 23 of Manbhum Collectorate, pargana Pandra, and the total land revenue payable in respect of it was Rs. 53-10-8 and the total cess payable was Rs. 1621-14-6. The decree-holder did not give any value of the properties in his execution petition. The first process issued in the case was the process of attachment in respect of both the touzi which purports to have been served on 28th November 1931. Thereafter a notice under O. 21, R. 66, Civil P. C., was issued and served on the judgment-debtor. The judgment-debtor appeared on 8th January 1932, and took time to file objection regarding valuation. On 15th January 1932, he filed an objection alleging the value of touzi No. 21 to be 15 lacs and that of touzi No. 23 to be 10 lacs; on 23rd January 1932, when the Court proceeded to enquire about the valuation of the property the decree-holder's pleader stated that he had no objection to the judgment-debtor's valuation being accepted without prejudice. The Court ordered the sale proclamation to be issued inserting the judgment-debtor's valuation. There was a miscellaneous appeal against that judgment by the judgment-debtor, and the sale of the property, which was to take place on 15th March 1932, was stayed by order of the Honourable High Court. On 16th March 1932, the aforesaid civil revision case was disposed of, and the order of this Court regarding valuation was set aside and the Court was directed to decide the question of valuation on the evidence. Thereafter on 2nd May 1932, there was an enquiry by this Court, and the Court valued touzi No. 23, which the decree-holder wanted to sell, at 2 lacs, and the sale proclamation in respect of that Touzi was issued, fixing 15th June 1932, for sale. That sale proclamation was not served for want of identifier, and on decree-holder's petition filed on 25th May 1932, a fresh sale proclamation was issued in respect of touzi No. 23 fixing 15th July 1932 for sale at noon. On that date the judgment-debtor applied for one month's time to pay up the decretal amount waiving the right to issue a fresh sale proclamation. Time was allowed and the sale was adjourned to 15th August 1932 at noon.

It is unnecessary to detail the subsequent proceedings, as the appellants now raise no separate point as to them; it is sufficient to state that the judgment-debtor obtained three further adjournments of the sale date on petitions in similar terms to that

of 15th July 1932, the date of sale being ultimately fixed for 27th September 1932. A similar petition by the judgment-debtor on this last date was rejected, and the sale took place on 27th September and the property was purchased by respondents 1 and 2 for Rs. 60,000. It may be added that on 20th August 1932, the judgment-debtor had paid Rs. 5000 towards the decretal amount. The only case of fraud alleged in the plaint was found to be untrue by the Subordinate Judge, and the appellants acquiesced in that decision. The case now rests solely on irregularities in publishing and conducting the sale. The Subordinate Judge found that certain material irregularities had occurred in publishing and conducting the sale, with the result that the property was sold for the small sum of Rs. 60,000, though it was valued at over three lacs of rupees, and that appellant 1 had thereby suffered substantial loss. The learned Judge rejected the respondents' contention, referred to later, that the said appellant had waived any objection to these irregularities, and as already stated, he set aside the sale. On appeal by the present respondents, the High Court reversed this decision and confirmed the sale, on the ground that in his petition of 15th July 1932, the judgment-debtor had stated that the sale proclamation had been properly served and that if time were granted he would not insist on the issue of a fresh proclamation, that time was granted on that and three subsequent occasions, always on the same condition and that, apart from fraud, his only case on which had been rejected by the Subordinate Judge, the judgment-debtor had waived any right to object to the irregularities found by the Subordinate Judge. The learned Judges, holding this view, did not discuss the correctness of the Subordinate Judge's findings as to the irregularities, but on the question of substantial injury to the applicant they stated:

> The many opportunities which the judgment-debtor has had prior to the sale, for the purpose of enabling him to avert the sale by raising on the property the money necessary to meet his decretal debt, indicate that the price realized is not so grossly inadequate in the present circumstances as to enable it to be held that the property has been sold for a grossly inadequate price due to irregularities in the proceedings.

While their Lordships find great force in this observation, they find it unnecessary to form a concluded opinion on this point, as they agree with the conclusion otherwise arrived at by the learned Judges. The material part of the judgment-debtor's petition of 15th July 1932, which is repeated in almost identical language in the three subsequent petitions, is as follows:

> Another date may be fixed by allowing one month's time for payment to the decree-holder after securing money. The sale proclamation has been properly served. If the money is not paid on the next date fixed the sale will take place on the strength of this proclamation. No fresh proclamation will have to be issued.

The judgment-debtor obtained, on the strength of these representations, an extension of time for payment of the decretal amount on four occasions. In the first place, he waived the necessity for a fresh sale proclamation, as is provided in O. 21, R. 69 (2). In the second place, he represented and thereby admitted that the sale proclamation had been properly served. There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error. The irregularities found by the Subordinate Judge on which the appellants now rely are as follows:

I. As to the attachment: (a) the Subordinate Judge had grave doubt of the truth of the service report of the peon; (b) that the copy of the attachment order was affixed at Poddardih, which is on touzi No. 21, and on no part of touzi No. 23, and (c) that no copy was sent to the Collector of Burdwan, in which District parts of touzi No. 23 are situate.

II. As to the sale proclamation: that the contents were defective, in that the description of the property was insufficient.

As regards the appellants' objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale proclamation, as appellant 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in 3 I A 230[1] in which this Board held that the waiver covered any

1. Girdhari Singh v. Hurdeo Narain Singh, (1875-76) 3 I A 230=26 W R 44 = 3 Sar 637 =3 Suther 294 (P C).

objection to an error in the statement of the Government revenue, as the judgment-debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge. While much might be said for the view that the repeated admissions by the judgment-debtor in this case, on the faith of which he secured delay, excluded any objection by him, in the absence of fraud, to irregularities in the attachment, their Lordships find it sufficient for disposal of this appeal to hold that, assuming the findings of the Subordinate Judge to be correct, these irregularities did not so materially affect the proceedings on the sale day as to justify the setting aside of the sale. It must be remembered that the main purpose of attachment is to prevent the transfer or charging of the property attached by the judgment-debtor. No date of sale is fixed until the sale proclamation, and, in view of their Lordships' decision, it must be taken that the sale proclamation and the subsequent proceedings were regular. In this case these proceedings extended over several months, and any effect of the irregularities in the attachment on the actual sale is highly problematical and remote and is insufficient to form the basis of the substantial injury which the appellants require to prove. Their Lordships are therefore of opinion that the appellants' objections to the attachment do not avail them in the present application to have the sale set aside. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

B.D./R.K. *Appeal dismissed.*

Solicitors for Appellants —
W. W. Box & Co.

Solicitors for Respondents —
A. J. Hunter & Co.

*** A. I. R. 1938 Privy Council 232**

(From Bombay : A I R 1935 Bom 423)

16th June 1938

LORD THANKERTON, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Commissioner of Income-tax, Bombay Presidency and Aden — Appellant.

v.

Chunilal B. Mehta, Bombay — Respondents.

Privy Council Appeal No. 29 of 1937.

(a) Income-tax Act (1922), Preamble — Difference with English Act.

The Indian Act is not in *pari materia;* it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions of the English Act: *A I R 1932 P C 138, Rel. on.* [P 236 C 2]

*** (b) Income-tax—Foreign contracts—Assessee resident in British India carrying trade there and controlling transactions abroad — Profits not received or brought into British India—Where they accrued or arose should be considered.**

A person in British India carrying on business there and controlling transactions abroad in the course of such business is not by these mere facts liable to tax on the profits of such transactions. If such profits have not been received in or brought into British India it becomes necessary to consider on the facts of the case where they accrued or arose. It cannot be said that the place of formation of the coatract prevails against everything else. In some circumstances it may be so, but other matters—acts done under the contract for example—cannot be ruled out *a priori.* Where the contract is neither framed nor carried out in British India, the profits cannot be said to have accrued or arisen in British India : *A I R 1920 Mad 344 (SB); A I R 1921 Bom 159; A I R 1923 Mad 574 (FB); A I R 1929 Lah 609 (FB) and A I R 1931 Bom 236, Approved.* [P 238 C 1]

J. Millard Tucker, Hubert Hull and J. Megaw — *for Appellant.*

A. M. Latter and R. P. Hills — *for Respondents.*

Sir George Rankin. — The High Court at Bombay has answered in favour of the respondent assessee two questions of law formulated and referred to the Court by the Commissioner of Income-tax (Bombay Presidency and Aden) under S. 66, Income-tax Act, 1922. The assessee is resident in British India and the year of assessment is the year ending 31st March 1934. By order dated 13th December 1933, the Income-tax Officer assessed the respondent on a total income of Rs. 12,95,726, the total demand for income-tax and super-tax being Rs. 7,18,472. This order was confirmed by the Assistant Commissioner on 19th January 1934. By these orders

the assessee was held liable to pay tax upon profits derived by him from contracts made for the purchase and sale of commodities in various foreign markets — Liverpool, London, New York and elsewhere outside British India. The assessee disputes his liability in respect of such profits on the ground that they were not profits "accruing or arising in British India." It is conceded that they are not otherwise chargeable: they have not been received in British India nor do they come under any of the provisions whereby they can be deemed to accrue or arise or be received in British India. No question arises as to the details of the transactions or as to the calculation of the tax. Though the transactions appear to have been of a speculative character and of the kind compendiously described as "dealing in futures," it is not now sought to charge the assessee upon the basis of any allegation that his contracts were made by way of gaming and wagering. In case however the place at which the profits accrued or arose should be held to depend upon the facts as to delivery of goods thereunder or intention to deliver the question propounded to the Court was stated in a double form as follows:

(1) Whether in the circumstances of the case all the profits and gains which accrued and arose to the assessee from the business of future delivery contracts entered into with parties outside British India in which no delivery was ever taken or given or any part of such profits and gains can be said to have accrued or arisen in British India.

(2) Whether as regards that part of the said business of future delivery contracts in which delivery had been actually given or taken outside British India, the profits or gains which accrued can be said to have accrued wholly or partly in British India or otherwise.

As it is found that in no case was the taking or the giving of delivery done within British India, the second question is separately stated in the interest of the assessee and on the footing that to it an answer might be given more favourable to him than the answer to the first. This indeed was the view of the Commissioner. In his opinion the answer to the first question should be that all the net profits and gains from these contracts (after payment of the services rendered by the brokers outside British India) accrued or arose in British India. To the second question he answered that part only of the profit and not the whole can be said to have accrued in British India. The learned Judges of the High Court were of opinion that the whole of the profits referred to in both questions accrued or arose outside British India. Their Lordships will confine their attention, in the first place, to the cases mentioned in the first question, postponing the second. The narrative given by the Commissioner in his Letter of Reference to the High Court contains material for a contention that the place at which the assessee entered into the contracts of purchase and sale was Bombay. Before their Lordships this contention was disclaimed by learned counsel for the appellant whose argument took the forms that the exercise of skill and judgment in and the giving of directions for the formation of the contracts took place in Bombay and that Bombay was the place at which the assessee carried on the business which had produced the profit. This leaves little room for dispute as to the facts of the case, which in the circumstances are sufficiently represented by the following extracts from the Letter of Reference:

2. The assessee has been trading in Bombay for several years past as broker and speculator in cotton, silver and other commodities. He has his office in Bombay only. He has also income from properties and dividends on shares in Joint Stock Companies. As regards the speculation business, the assessee does this on his own account as well as on account of his constituents and he carries on his business not only with parties in British India but also with parties outside British India, e. g. at Liverpool, London and New York. Profit or loss from such business as is done on his own account is his. As regards business done on account of his constituents, he charges brokerage and the profit or loss arising therefrom is theirs.

7. As in this connexion, it is necessary to have some idea of the exact manner in which the assessee does this speculation business, I beg to refer here to an actual transaction to show how it was put through. Taking up the New York Cotton Exchange, on 29th October 1930, the assessee sent a telegram to A. Norden & Co. of New York asking them to "Buy 500 March at the closing." A copy of the telegram is annexed hereto and marked Ex. E. This was done at 11.74 cents per lb (a bale containing 500 lbs.), as appears from the reply telegram of the same date which runs "Bought March 500, 11.74" (copy annexed and marked Ex. F). On 1st December, the assessee sold the 500 bales by sending again a telegram to the above firm asking it to sell. The telegram ran "Sell 500 March" (copy annexed and marked Ex. G). The firm did so at 10.84 cents per lb., as appears from the reply telegram of the same date which ran "Sold March 500, 10.84" (copy annexed and marked Ex. H). A copy of letter dated 1st December 1930, from the above firm confirming the sale is also annexed hereto and marked Ex. I. The difference between the purchase and sale price amounted thus to $2250 which the assessee had to pay along with the amount of $90.21 charged by the firm on account of brokerage and other expenses. The assessee neither paid the purchase price nor recovered the sale price nor did he take

or give delivery of the said 500 bales. He paid only the difference between the two prices. (This is also what he would do with a broker in Bombay while dealing with a party here.) All that is to be done in a business of this kind is thus merely to issue an order to a broker for forward purchase or sale and then issue another order closing the transaction.

It is not necessary to refer to certain documents which in the case of the Liverpool transactions were sent to Bombay for signature, since these bear solely on the contention not now persisted in that the place of formation of the contracts was Bombay; but the following extract from the opinion of the Commissioner may be added as disclosing his view of the facts :

10. As regards question (1), I beg to say that the assessee has got his office here in Bombay alone where he does all the business, the profits of which are to be taxed. Each and every transaction which ended in these profits has been personally managed by the assessee and has not been left to the discretion of any agent of his abroad. These activities on his part which resulted in the profits or gains sought to be taxed all took place in Bombay and nowhere else. . . . . He considered in Bombay the prevailing prices of cotton, silver, etc., at Bombay, London, Liverpool and New York and made up his mind here to enter into each of the future delivery contracts under consideration. . . . There must be two parties to a contract. Hence the assessee being one party thereto had to find another party and for that purpose had to employ brokers outside British India but that cannot be interpreted as meaning that what he earned by his efforts in British India was earned where the brokers were located. The brokers merely helped him in getting into contact with parties willing to enter into a contract with him. Surely the profit which the assessee earned must have accrued somewhere and when everything which he need do to earn it was done by him in Bombay (including employment of brokers which too was done from Bombay), it is difficult to see how the profit could be said to have arisen in London or New York where the assessee never set foot. All the activities on his part which resulted in this profit took place in Bombay and the profit which was the result thereof must be taken to have accrued here and nowhere else.

This view, it will be observed, proceeds upon a consideration of the particular transactions and the method by which each transaction was entered into and carried out. But the argument has been heightened or reinforced by maintaining that the profits now in question being profits of a business carried on in Bombay, all the profits of such business become chargeable to tax as accruing or arising in Bombay and that it is not necessary or permissible to discriminate between any of such profits for the purposes of the charge imposed by the Act. Profit in the case of a business—so runs the argument—is the result of all the transactions whether plus or minus : not to treat them as a whole is illogical and highly inconvenient: they must all accrue or arise in the same place — the place at which the business is directed or controlled, the place at which the assessee exercises his trade. If this doctrine be right, much may depend upon the question whether the assessee has carried on one business or more than one. As the Commissioner has stated that the assessee kept separate books for his transactions with parties in British India and with parties abroad, there may be something here not unworthy of a careful consideration. But their Lordships will assume (without in any way deciding) that, whether in fact or in law, no difficulty arises in regarding all the assessee's foreign dealings as part of his Bombay business. If the profits of the assessee's speculations on the various foreign markets be regarded distributively as separate transactions the question for decision is not inaptly framed by Beaumont C. J. as follows :

Does the fact that profits arising under contracts made abroad depend on the exercise in Bombay of knowledge, skill and judgment on the part of the assessee and upon instructions emanating from Bombay, involve that the profits arose or accrued in British India ?

The words "accruing or arising in British India" may be taken, provisionally and in the first place, as an ordinary English phrase which derives no special meaning from the Act. The alternative "accruing or arising in" and the antithesis between these words and the words "received in" or "brought into" afford no safe inference of any special meaning. "Profits . . . accruing or arising in British India" are words which in their ordinary meaning seem to require a place to be assigned as that at which the result of trading operations comes, whether gradually or suddenly, into existence. Though the division is only between British India and the rest of the world, the notion may be difficult to apply to a particular transaction, debits and credits being intangible and not occupying space. But the revenue authorities who have to disclose reasons good in law for affirming that any profits "arose or accrued in British India" have in the present case two things only to put forward—apart, that is, from the argument as to "business" which will be dealt with separately in this judgment. These two things are : (a) the exercise of skill and judgment in Bombay, (b) the giving of the directions from Bombay. It is difficult indeed to see

that the place at which a man takes a decision to do something in New York or to ask someone else to do something for him in New York is the place at which arises the profit which results from the action taken in consequence of the decision. And if the place from which he issues his instructions be regarded as a separate element the identity of place is no less difficult to detect. That the profit may be causally attributed to the assessee's decision is reasonable enough : though it be not the proximate cause nor the whole of the cause, it is in the chain of causation the link which most deserves the attention of anyone who desires to explain the success of the transaction. For this, and it may be for other purposes, the selective process which ignores the intermediate links is justified. But is the same selective process justified for the purpose of assigning the place at which the result arose ? Their Lordships think not. It can hardly be maintained that whatever the man decides upon in Bombay and whatever may be done abroad in pursuance thereof, the profit must necessarily arise in Bombay. One must look at the transaction to see what happened in British India and what happened elsewhere. The intermediate links may be all important. Here the profit is the difference between a sale and a purchase both effected in New York and then set off and so far carried out in New York that a New York broker has money in his hands or under his control which as between himself and the assessee belongs to the assessee.

To determine the place at which such a profit arises not by reference to the transactions or to any feature of the transactions but by reference to a place in India at which the instructions therefor were determined on and cabled to New York is, in their Lordships' view, to proceed in a manner which cannot be supported if the transactions are to be looked at separately and the profits of each transaction considered by themselves. There is distinct paradox in the contention that the profits resulting from an order placed in New York would have accrued or arisen in the same place (Bombay) had the order been sent to Liverpool with a like result, but that had the assessee decided on and directed the same New York transaction when in Hyderabad the same profits would have arisen in a different place (Hyderabad). So far therefore their Lordships are in agreement with the High Court and they think that it makes no difference to the result whether the transactions be regarded as dealings in goods or as dealings in differences.

The main contention however of the appellant is that the profits of the assessee's "foreign" transactions are but part of the profits of his Bombay business which must be computed as a whole, all profits and all losses having their effect upon the final figure. The clear and able argument of Mr. Tucker did not seek to contest that in computing the profits of any business under S. 10 of the Act, the revenue authorities are only entitled to include such profits as accrue or arise or are received in British India or are to be deemed to be within this class. S. 10 applies indifferently to a business carried on within British India and to a business carried on elsewhere. But it is said, while that is formally true upon the face of Ss. 4, 6 and 10, the principle has to be applied in the case of business profits, that loss or profit is the result of the trade as a whole, that the source of the profit is the business as a business and that the ultimate and total profit of the business must be regarded as accruing or arising at the place of direction or control. On this view it seems that a business carried on outside British India could have no profits accruing or arising within British India though it might be liable to tax on different principles. So too a business carried on in British India could have no profits which did not arise or accrue within British India. The result is that by sections of the Act which make no mention of the place where the business is carried on, the tax is really levied upon the whole or upon none of the profits of a business according as it is or is not carried on in British India. If and only if the owner of a foreign business be not resident in British India, its profits from any business connexion or property in British India are taxable by the special provisions of S. 42.

Their Lordships do not consider that the Income-tax Act is patient of this construction. They will first deal with the argument based on Ss. 4 and 6 that the respondent's business is the source of the profits and that the sections require that the situation of the source should determine the place where the profits arise. This, in their Lordships' view, is a straining of the sections. The effect of S. 6 is to classify profits and gains under different heads for the purpose of providing for each appropriate rules for computing the amount : its

language is "shall be chargeable . . . in the manner hereinafter appearing." One of the heads is "Business," which as a head of income stands alongside Salaries, Interest on securities, Professional earnings and Other sources. True, the classification of income is according to the character of the source, and it has been held that "income, profits and gains" as distinct from casual receipts and from other forms of receipt or enrichment, involve the idea of a periodical money return from a definite source : 59 I A 206.[1] It may further be said that sub-s. (1) of Sec. 4 having used the word or notion "source" the words which follow "accruing or arising" are language in consonance therewith. But the list of "heads" in S. 6 is a list of sources not in the sense of attributing the income to one property rather than another, one business rather than another, but only in the sense of attributing it to property as distinct from employment or business as distinct from investment. Ss. 4 and 6 taken together say of business profits that they are taxable on certain conditions stated in S. 4 and in a manner to be laid down in a later section. When one comes to that section (S. 10) and not before, a further idea is introduced :

> The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gians of any business carried on by him.

What is to be learnt from an examination of the language of sub-s. (1) of S. 4—income profits and gains as described or comprised in S. 6 from whatever source derived—is that S. 6 is intended as describing different kinds of profit and that if the condition "accruing, arising or received in British India, etc.," is satisfied by the profits, they will not escape by reason of any quality or circumstance of the source. There may be room for the view that having regard to the sixth head in S. 6 the words "from whatever source derived" are surplusage : even so, they are not there as a guide to the place where profits accrue or arise but to make clear that for another purpose source is irrelevant. There is every presumption that in such a section in an Indian Act the Legislature intends the exact language of the section to be the test of liability. To answer the question, "Do these profits accrue or arise in British India?" by asking another, "What in the sense of S. 6 is the source of these profits and is it situate in British India?" is to divert attention from that to which the statute points and to devote attention to what it discards. Nothing could be easier than to say "from whatever source derived if situate in British India" had this been intended. But it would have been by no means easy to apply. The source of salaries, of interest on securities, of professional earnings, is not readily described as situate anywhere though the place where an employment is carried on, or an investment made, or a salary or fees are earned is a familiar notion. There would have been no difficulty in the case of "property" and with the aid of certain rules, little difficulty, it may be, in the case of "business." But the Legislature has chosen a different test and applied it to all kinds of profits—"accruing or arising in British India." It may even have chosen it as fairer because it could be applied distributively to the profits of a single source. However that may be, the profits of each particular business are to be computed wherever and by whomsoever the business is carried on, but only on condition that they are profits "accruing, arising or received in British India," etc. What connexion exists, if any, between place of direction and place at which the profits arise is a matter not touched by Ss. 4, 6 or 10. Not only do they lay no stress upon the place at which the business is carried on ; they make no mention of it. In these circumstances it cannot be held that it is itself the test of chargeability by virtue of a rule, not mentioned either, that profits arise or accrue at the place where the business is carried on.

The argument from the use of the word "source" in the Act is supported by appeal to principle, and cases under the English Act have been referred to on the matter. It would be both unreasonable and ungrateful to complain of the use made, by learned counsel on both sides, of the English decisions, but their Lordships have carefully to remind themselves that :

> The Indian Act is not *in pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal: per Sir George Lowndes in 59 I A 206[1] at p. 212.

The English Act has for many years imposed the tax upon all who exercise a trade within the United Kingdom and observations of English Judges by way of exposition of this policy cannot be authority on the problem under the Indian Act. In

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1. Commissioner of Income-tax v. Shaw Wallace & Co., (1932) 19 A I R P C 138 = 136 I C 742 =59 Cal 1343=59 I A 206 (P C).

any case their Lordships are not satisfied that apart from the dictate of any statute, authority in England has established the proposition that the place at which profit accrues or arises is the place of central control. Cockburn C. J. in (1860) 5 H & N 711[2] at p. 717 indeed observed :

> Wherever a merchant is established, in the course of his operations his dealings must extend over various places ; he buys in one place and sells in another. But he has one principal place where he may be said to trade—viz., where his profits come home to him. That is where he exercises his trade.

But the question here is whether under the Indian Act the place where certain profits did not come home to him is the place at which they accrued or arose. There seems to be no necessity arising out of the general conception of a business as an organization that profits should arise only at one place. This indeed seems to have been the view of Cockburn C. J. in the case cited (*cf.* p. 716). Their Lordships have also been referred to an observation by Lord Macmillan in (1938) 54 T L R 568[3] at page 571 :

> In the case where the brewer sells his own beer in the public-house which he rents he no doubt benefits his brewery by having an assured channel for the disposal of his beer, but the profit is actually made where the sales are effected—that is in the public-house.

No doubt, if it can be held that under the Indian Act profit in the case of a business must be taken so strictly that it is not to be understood distributively at all, the profit of the assessee's business would become an ultimate and single figure, irreducible, and referable only to Bombay. But such high doctrine cannot be read into the Indian statute without violence not only to its language but to its scheme. Profits are frequently if not ordinarily regarded as arising from many transactions each of which has a result—not as if the profits need to be disintegrated with difficulty but as if they were an aggregate of the particular results. In the present case the assessment order has discriminated between the Bombay and the " foreign " business income. To discriminate between all kinds of profits according to the place at which they accrue or arise is a plain dictate of the statute: other discrimination is involved in the exemptions and in such sections as S. 42.

The construction or application of the Act for which the appellant contends is seen to involve further difficulty if attention be paid to sub-s. (2) of S. 4, as it stood after Act 27 of 1923 and prior to Act 12 of 1933 :

> *4*—(2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.
>
> *Explanation.*—Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance-sheet prepared in British India.

If this sub-section was solely directed to the case of a person resident in British India being the owner of a business carried on outside British India, no doubt meaning can be given to it without supposing that it was aimed at the foreign part of the business done by persons, firms and companies in India. The reference to the "balance sheet prepared in British India" makes the supposition difficult and their Lordships do not think that the amendment of 1923 was based upon or is consistent with the view that all the profits of a business carried on in British India accrue or arise in British India. So too, even if it be right that a business carried on outside can have no profits which accrue or arise within British India, much of the profits of business done in British India by firms abroad would be taxable under Sec. 42 (1) as "accruing or arising whether directly or indirectly through or from any business connexion or property in British India". But apart from the difficulty of supposing that all such profits are within the sub-section, there is the important fact that the sub-section does not apply at all where the assessee is resident in British India : such a person owning a foreign business would escape altogether. Of course it may be that a resident would be more likely to bring the profits into British India, but even so, if the appellant's view is sustained, a leakage which can hardly have been intended must result. Their Lordships have no hesitation in saying that the sub-section is more readily intelligible as an addition to a provision which catches profits arising in British India to businesses carried on outside.

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2. Sully v. Attorney-General, (1860) 5 H & N 711=29 L J Ex 464=6 Jur (N S) 1018=2 L T 439=8 W R 472.
3. Robinson Brothers (Brewers), Ltd. v. Assessment Committee, (1938) 54 T L R 568.

These considerations lead their Lordships to the conclusion that under the Indian Act a person resident in British India carrying on business there and controlling transactions abroad in the course of such business is not by these mere facts liable to tax on the profits of such transactions. If such profits have not been received in or brought into British India, it becomes or may become necessary to consider on the facts of the case where they accrued or arose. Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be nearly impossible and wholly unwise—to use the language of Lord Esher in (1881) 8 Q B D 414[4] p. 418. They are not saying that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters—acts done under the contract, for example—cannot be ruled out *a priori*. In the case before the Board the contracts were neither framed not carried out in British India: the High Court's conclusion that the profits accrued or arose outside British India is well founded.

The consideration that the view now taken by their Lordships would appear to have been accepted hitherto in India is one which they mention last as the question is raised as one of construction of a statute. But it would be paying less respect than is due to the decisions of the Indian Courts if mention were not now made of the cases in 1 I T C 37,[5] 1 I T C 116,[6] 1 I T C 202,[7] 4 I T C 40[8] and 55 Bom 231=5 I T C 108.[9] These and other cases have been fully considered by the Board. The construction which the appellant seeks to put upon the Act has no direct support from them and the main current of authority in India is inconsistent therewith. No separate consideration of the second of the questions referred to the High Court is required. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Solicitor, India Office.

Solicitors for Respondents —
Barrow, Rogers and Nevill.

4. Erichsen v. Last,(1881) 8 Q B D 414 = 51 L J Q B 86=45 L T 703 = 30 W R 301 = 46 J P 357.
5. Secretary to the Commissioner Salt, Abkari & Separate Revenue, Madras v. Ramanathan Chetty, (1920) 7 A I R Mad 344 = 53 I C 976 = 43 Mad 75 = 37 M L J 663 = 1 I T C 37 (S B).
6. In re Aurangabad Mills Ltd., (1921) 8 A I R Bom 159 = 64 I C 9 = 45 Bom 1286 = 23 Bom L R 570 = 1 I T C 116.
7. Secy. Board of Revenue (Income-tax), Madras v. Ripon Press & Sugar Mills Co. Ltd., (1923) 10 A I R Mad 574 = 77 I C 621 = 46 Mad 706 = 44 M L J 523 = 1 I T C 202 (F B).
8. Jiwan Das v. Commissioner of Income-tax, Punjab & N. W. F. Province, (1929) 16 A I R Lah 609 = 117 I C 657 = 10 Lah 657 = 30 P L R 489 = 4 I T C 40 (F B).
9. Sarupchand Hukumchand v. Commissioner of Income-tax, Bombay, (1931) 18 A I R Bom 236 = 132 I C 505 = 55 Bom 231 = 33 Bom L R 382 = 5 I T C 108.

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(From the Isle of Man)

27th May 1938

THE LORD CHANCELLOR (LORD MAUGHAM), LORD WRIGHT AND LORD ROCHE.

Attorney-General for the Isle of Man — Appellant.

v.

Emily Moore — Respondent.

Privy Council Appeal No. 48 of 1937.

Mines and Minerals — Whether certain material is mineral and comes within words of reservation is question of fact—Shale held did not come within reservation of mines or minerals or delfs of flagg, slate or stone.

Whether particular material is mineral and comes within the reservation made by the Crown is an issue of fact to be decided according to the particular circumstances of the case, the duty of the Court being to determine what the words meant in the vernacular of the mining world, the commercial world and landowners at the relevant time. [P 241 C 1]

Shale is a chalky or clayey substance, generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers as the result of pressure it has assumed a rocky character, but even so it is still friable and without the hardness which characterizes stone or slate. [P 240 C 2]

Held it did not come within the reservation of mines and minerals, quarries and delfs of flagg, slate or stone : *Case law referred.* [P 242 C 1]

R. B. Moore (H. M. Attorney-General for the Isle of Man) (Manx Bar) and H. O. Warckwerp — *for Appellant.*

Raymond Evershed, K. Johnstone and S. J. Kneale (Manx Bar) — *for Respondent.*

Lord Wright.—This is an appeal from the High Court of the Isle of Man by His

Majesty's Attorney-General for the Island. It raises an important question on the construction of the Act of Tynwald, known as the Act of Settlement of 1703-04. The appellant claims on behalf of His Majesty, who is Lord of the Isle and Manor of Man under a title, the history of which was expounded by this Board in (1879) 4 A C 294.[1] What was there said need not be repeated here. Nor is there any dispute as to the position of the respondent so far as relevant to these proceedings. She is the holder of the Raggatt estate, which is a Manx customary estate of inheritance held by her from the Lord of the Island. Such estates, the nature of which was also fully discussed by this Board in (1879) 4 A C 294,[1] had been originally estates of a low kind of tenure which by custom and judicial decision had grown into customary estates in fee simple, subject to the discharge of certain payments to the Lord of the Isle. But as doubts and difficulties had arisen between the Lord and the tenants as to the extent and quality of the tenants' estates, the Act of Settlement was passed at a Tynwald Court on 4th February 1703, by James, Earl of Derby (the then Lord), the Governor and other his Lordship's Officers and 24 Keys, the representatives of the Isle, to settle and confirm the estates and tenures of the tenants. The Act was duly proclaimed in 1704, along with an Amending Act. The estate of the respondent is for purposes of this case regulated by the terms of these Acts. S. 14 provides that the tenants' estates should be good and perfect customary estates of inheritance descendible from ancestor to heir according to the laws and customs of the Isle, and S. 15 contained a clause for peaceable enjoyment by the tenants, subject to their due payment of rents and fines and performance of other services. S. 16 contains the words on which the decision of this dispute depends. It is a clause of reservation by the Lord of "all such Royalties, Regalia, Prerogatives, Homages, Fealtys, Escheats, Forfeitures, Seizures, Mines and Minerals of what kind or nature soever, Quarrys and Delfs of Flagg, Slate or Stone, Franchises, Libertys, Privileges, and Jurisdictions whatsoever, as are now and at any time heretofore have been invested in the said James, Earl of Derby, or in any of His Ancestors, Lords of the said Isle." The Amending Act by S. 7 provides that notwithstanding the general words of the previous Act, every tenant and farmer should have liberty to dig and use all sorts of slate and stone on his tenement for his own use and the improvement of his own and his neighbours' estates, but not to dispose of them as merchandise without license. S. 8 provides for the case where a tenant having a quarry of limestone or other common stone on his grounds should refuse to allow another person to get the stone for the improvement of that person's lands. In that event the Governor of the Isle might give authority to that person to dig and carry away, on paying reasonable compensation, as much as should be necessary for his use. These amending sections do not, in their Lordships' judgment, throw any light on the meaning of the words of S. 16 of the principal Act.

The dispute which is the subject of this appeal has reference to the extent of the rights reserved to the Lord by the Act. The appellant, on 9th March 1936, issued an information on behalf of the Crown against the respondent alleging that there existed under part of the Raggatt, the respondent's estate, a valuable bed of mineral suitable for the purpose of merchandise and for making into bricks and other articles, and that the bed of mineral, commonly known as shale, was met with a few feet below the surface of the ground and could most conveniently be won by open workings. He claimed a declaration that the shale was within the reservation of mines and minerals under the Act, and a declaration of the Crown's right to enter on the lands, break the surface and search for, win, work and take away all minerals, including the mineral commonly called shale. The respondent by her answer, while admitting that her estate of customary freehold was subject to the Crown's legal rights, contested the right claimed in the information, and in particular denied that the shale was a mineral within the meaning of the Act of Settlement. She further averred that it was the ordinary subsoil of the estate and district and her absolute property and was composed essentially of clay and sand. At the trial, the Deemster Farrant held that shale was not within the reservation of mines and minerals in the Act, or of quarries or delfs of flaggs, slate or stone, and gave judgment in favour of the respondent. The appellant then appealed to the Staff of Government Division of the

1. Attorney-General for the Isle of Man v. Mylchreest, (1879) 4 A C 294=48 L J P C 36 =40 L T 764.

Isle of Man. At the hearing the Judges of that Court were equally divided. The Judge of Appeal agreed with the First Deemster that the shale did not come within the reservation of mines or minerals, or of flagg or slate, but differed from him in holding that it came within the reservation of stone. He would have allowed the appeal. But as Deemster Cowley, the other Judge, agreed on all points with the First Deemster, the result was that the appeal was dismissed and the judgment appealed from stood. From this decision the appellant appeals to His Majesty in Council.

Manx shale first became a matter of commercial interest in or about 1883, when a company called the Glenfaba Brick and Tile Company obtained a lease or license from the Crown subject to a fixed rent and royalties to win and work the shale from the Glenfaba estate, which was in proximity to the Raggatt estate, and proceeded to work the bed of shale at Glenfaba. The Company used the shale in order to make bricks. In or about 1936 the workable bed was becoming exhausted. They then applied to the Crown to grant them a similar lease or license in respect of the Raggatt estate. The respondent objected and the information was laid in order to ascertain the Crown's rights. Apart from a suggestion that the Crown was entitled to rely on a custom, which both Courts have rightly negatived, the question, as both parties agree, is whether shale, which is not specifically mentioned in the section, is included in the reservation of "mines and minerals of what kind or nature soever, Quarrys and Delfs of Flagg, State or Stone . . . . as now are or at any time heretofore have been invested " in the Lord.

The first use of the word 'shale' cited in the Oxford English Dictionary is in 1747. The word is there defined as an argillaceous fissile rock, the laminae of which are usually fragile and uneven and mostly parallel to the bedding. Expert evidence as to the nature of this shale given at the trial was conflicting in many respects. It appears however to be common ground that this shale forms the subsoil of the Raggatt and indeed of a large part of the Island : that when wetted it breaks down into mud and that for this and other reasons it is incapable of being used for roofing or for any other purpose for which common slate is used. The shale is found at a depth of about 2½ feet from the surface of the land and goes down for a considerable distance, 50 feet or more. Some portions, generally at the top, are soft and are described as dark blue clay and as plastic. It is this portion which is peculiarly suitable for brickmaking. The shale, including harder or more rocky portions which are found generally lower down, is crushed by 6 ton rollers, water being added where necessary. When thus crushed it can be used for making bricks which are called shale bricks. One witness described it as a sort of soft stone which by crushing can be made into a plastic substance. But even the hardest portion is friable. In the evidence shale was also described as a laminated variety of clay, or as a hardened and compressed clay. It was also variously described as a very poor quality slate, a decomposed slate, or on its way to become slate. It was admittedly of no use for road making or for building. It was said to be chemically indistinguishable from slate or clay, but it is clear that chemical analysis does not assist on a question of this character. The conclusion broadly seems to be that it is a chalky or clayey substance, generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers as the result of pressure it has assumed a rocky character, but even so it is still friable and without the hardness which characterizes stone or slate.

In the information it was alleged that this shale was a mineral within the words of reservation. A great part of the evidence at the trial was directed to establishing this claim as a matter of fact. But before this Board it was admitted by the Attorney-General that the contention that this shale was a mineral could not be maintained. This Board had held in (1879) 4 A C 294[1] that in S. 16 of the Act " mines and minerals" had a connotation limited to subterranean workings, and did not include surface workings or the material got by surface workings, such as the shale in question. It is true that since (1879) 4 A C 294[1] the House of Lords in (1890) 15 A C 19[2] held (Lord Macnaghten dissenting) that "mines and minerals" as used in the Railways Clauses Act and similar statutes were not limited to underground workings, but the language of these Acts, as well as their purpose and scope, is different. The con-

2. Midland Railway Co. v. Robinson, (1890) 15 A C 19=59 L J Ch 442 = 62 L T 194=38 W R 577=54 J P 580.

trast in the Act of Settlement between "mines" and "quarries" and "delfs" (that is open pits or diggings) obviously excludes any construction of "mines and minerals" except a construction limited to subterranean workings.

There remains the question whether this shale can be held to be covered by the specific words "flag, slate or stone." The principles to be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railways Clauses Act and similar Acts. After some conflict of judicial opinion it has been finally established by (1910) A C 116[3] followed by (1911) A C 290,[4] that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the Court being to determine what the words meant in the vernacular of the mining world, the commercial world and landowners at the relevant time, which in this case is the date of the Act of Settlement of 1703. It was thus that mutatis mutandis Lord Loreburn stated the question in (1910) A C 116[3] at p. 127. Such an issue is necessarily an issue of fact, because it must depend on evidence of the actual user of the words, that is, the way in which they were in practice used by the classes of persons enumerated. Another point may be noted. Lord Loreburn L. C. pointed out in (1911) A C 290[4] at p. 299 that "the evidence given (in that case) as to common meaning is evidence given of the common meaning at the present day." He adds :

> I should assume that it was the same at the time of sale unless sufficient ground was given for coming to a contrary conclusion.

But in the present case, the fact that no one thought of this shale as capable of any valuable use at all or as a commercial material in 1703 or indeed until about 1883 when it was first used for brickmaking, might well be a ground for holding that even if to-day the words had acquired the requisite vernacular meaning, the position must have been different in 1703. On this principle it was held in (1912) S C 1327[5] that a special species of shale, that is, oil shale, had become a commercial mineral by 1862 because the term was used by those concerned as equivalent to oil bearing shale, whereas no such vernacular use could have existed in 1812, when the material was not recognized as of any commercial value at all or as being anything but waste. But, it is here unnecessary to labour that point, because on a careful consideration of the record in this appeal, their Lordships have been unable to discover any substantial evidence of fact that the words flag, slate or stone or any one of them are at the present time used or have ever been used, in the vernacular of commercial, mining or land-owning circles to signify this shale. It is not clear from the record that that particular issue of fact was ever precisely envisaged in the course of the evidence. Some confusion was no doubt introduced because of the emphasis directed in the pleadings and the evidence to "mines and minerals," words which are now admitted to be irrelevant in this dispute. But, in general, it appears that, with perhaps one exception, no specific questions were put and no specific answers were elicited as to the vernacular use of the words of the reservation, either in 1703 or 1704 or the present time, and in particular of the vernacular use of the words slate or stone, these being the words to which before their Lordships the appellant's claim was limited. The fact that this shale was not capable of being used for the ordinary purposes to which slate or stone are respectively applied, such as roofing or building is prima facie inconsistent with a vernacular designation of shale as slate or stone. So also is the fact that before 1883 shale was not regarded as of any commercial value at all. A similar conclusion seems to follow from the difference in physical character which distinguishes shale from slate or stone. It is true that in three leases granted by the Crown since 1883 for the getting of shale for brickmaking, the material is described as "shale or stone," but in the special circumstances of the case that cannot, in their Lordships' opinion, be regarded as evidence of a vernacular use of the word stone as including this shale. The manager of the Glenfaba Brick Works said that he would not call the material slate or stone, a piece of evidence which seems to be an exception to the general absence of specific question or answer on the vernacular use of the words. A director of the same works

3. North British Railway Co. v. Budhill Coal and Sandstone Co., (1910) A C 116 = 79 L J P C 31.
4. Caledonian Railway Co. v. Glenboig Union Fireclay Co., (1911) A C 290=80 L J P C 128 =104 L T 657=75 J P 377.
5. Linlithgow v. North British Railway Co., (1912) S C 1327=49 Sc L R 804.

said, that "one can't call it a slate," and that he considered shale as a "sort of soft stone." It is questionable how far the language used by scientific geologists is helpful in determining an issue of this character, but for what it is worth it may be noted that Professor Lamplugh in his geological survey of the island, published in 1903, does not without qualification describe shale as either slate or stone, though he describes it as decomposed slate. Their Lordships on the whole case see no reason to differ from the finding of fact of Deemster Farrant based on a careful and exhaustive examination of the evidence which it is here unnecessary to repeat, that shale such as that now in question could not have been described as slate by mining experts, commercial men or land-owners either in 1703-04 or to-day, or to differ from his similar finding that it would not have been included in a description of stone by any of the same classes of persons. These findings of fact, which their Lordships accept, are fatal to the appellant's case. Deemster Farrant's finding in respect of slate, is concurred in by both Judges of Appeal. There is thus on this point a concurrent finding of fact which is sufficient on the established rule of the Board to conclude the issue *quoad* slate before their Lordships. On the meaning of stone there is not a concurrent finding because the Judge of Appeal, differing from his colleague in the Court of Appeal, was of opinion that shale was stone. Their Lordships, with all deference, are unable, for reasons already given, to agree with him on this point.

This conclusion renders it unnecessary to decide two further contentions raised on behalf of the respondent. One was that the appellant's claim if successful would have the result that the reservation would nullify the estate granted. As the shale can only be worked by removing the surface soil and by open workings, the 25 acres which constitute the respondent's estate would be rendered worthless to her by the process of extracting the shale, and her enjoyment of it would be destroyed. On this ground it was contended on the authority in (1872) 7 Ch A 699,[6] that the Court would not permit the Crown or its licensees to exercise the rights they claim under the reservation even if the words of reservation on their true construction were held to include shale and even on terms of paying compensation. Against this it was pointed out that in (1910) A C 83[7] at p. 85, Lord Macnaghten seems to have been of opinion that the china clay which was there held to be a mineral might be worked though such working might destroy or interfere with the use of the railway and destroy the surface. That however was under a different type of statute because the railway company could always prevent the working by paying the ascertained compensation. But as their Lordships hold that the shale is not within the words of reservation, it is not necessary to express any final opinion on the matter. The second point raised by the respondent was that the words of reservation are expressly limited to mines and minerals and quarries and delfs of flag, slate or stone such "as now are or at any time heretofore have been vested" in the Lords of the Isle, and hence, as it was argued, only mines, quarries and delfs existing in 1703 are within the Section, so that as it was said, the Crown as Lord had no right to enter upon land and form a new quarry or delf not already existing in 1703. If on the true construction such a limitation of mining or of quarrying operations of flag, stone or slate was imposed by the Act, the practical consequences might well be serious, but their Lordships, while not giving any express decision see no reason, as at present advised, to differ from the Judges of the Courts below, who have all rejected that construction. Notwithstanding the able argument of the Attorney-General, which loses nothing in merit because it has not succeeded, their Lordships are of opinion on the whole case that the appeal fails and should be dismissed with costs. They will humbly so advise His Majesty.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Commissioner for Crown Lands.

Solicitors for Respondent —
Linklaters & Paines.

6. Hext v. Gill, (1872) 7 Ch A 699 = 41 L J Ch 761 = 27 L T 291 = 20 W R 957.

7. Great Western Railway Co. v. Carpalla United China Clay Co. (No. 1), (1910) A C 83 = 79 L J Ch 117=101 L T 785=74 J P 57=54 S J 151=26 T L R 190.

A. I. R. 1938 Privy Council 243

(From Calcutta : A I R 1936 Cal 459)

28th June 1938

LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Bengal Coal Co. Ltd. — Defendant— Appellant.

v.

Sri Sri Janardan Kishore Lal Singh Deo and another — Plaintiffs — Respondents.

Privy Council Appeal No. 69 of 1937, Bengal Appeals Nos. 30 and 35 of 1936.

Bengal Cess Act (9 of 1880), Ss. 5 and 6— Mining lease providing that lessees were to pay and discharge all taxes, rates, etc. in nature of public demands—Lessors required to pay cesses and taxes under Bengal Cess Act and Bengal Mining Settlements Act suing lessees for reimbursement—Claim for sums paid under the two Acts held well founded—Claim for sum paid as income-tax held not maintainable.

One of the covenants in a mining lease provided that the lessees 'shall pay and discharge all taxes, rates and assessment and impositions whatsoever being in the nature of public demands which shall from time to time be charged, or assessed or imposed upon the said mines or any part thereof by the authority of the Government of India''; and the lessors being required to pay certain cesses and taxes under the Bengal Cess Act (1880) and under S. 10 (1) (b), Bengal Mining Settlements Act, sued the lessees for reimbursement in respect of the sums paid by them. They also claimed to be reimbursed for the amount paid by them as income-tax upon royalties reserved by the lease :

Held that the claim of the lessors for reimbursement of the amount paid under the Bengal Cess Act and the Bengal Mining Settlements Act were well founded. That the lessors were not however entitled to be reimbursed in respect of the sum paid by them as income-tax as it was not a tax imposed on the mines in any sense relevant to the lessees' covenants in a mining lease : *(1888) 13 A C 613, Ref.* [P 245 C 1]

Cyril Radcliffe and L. M. Jopling — *for Appellants.*

A. M. Dunne, J. M. Parikh, Sir Hari Singh Gour and R. Parikh — *for Respondents.*

Sir George Rankin.—By a mining lease dated 4th March 1915, the plaintiffs demised to the Bengal Coal Co. Ltd. (defendants) therein called "the lessees," the mines, beds, veins and seams of coal in Mousa Poidih in the District of Burdwan for 30 years from 1st April 1915. The first of the lessees' covenants contained in part 7 of the schedule to the lease was in the following terms :

The lessees shall pay the royalty and royalties reserved by this lease at the time and in the manner above appointed in that behalf and shall also pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by the authority of the Government of India or the said Local Government or otherwise except demand for land revenue and shall also pay interest at the rate of 12 per cent. per annum on all arrears of such royalty or royalties from the due date thereof.

By their plaint filed in the Court of the Subordinate Judge at Asansol on 21st June 1929, the plaintiffs claimed to be entitled under this covenant to decree against the defendants for a sum of Rs. 2095-8-0 together with certain interest. The claim is for reimbursement in respect of certain cesses or taxes for which the plaintiffs became liable between the years 1923-1929 (inclusive) and which they have paid. These public demands are three in number, namely (1) road and public works cess under the Cess Act, 1880 (Bengal Act 9 of 1880); (2) expenses charged to the plaintiffs under cl. (b) of sub-s. (1) of S. 10, Bengal Mining Settlements Act, 1912 (Bengal Act 2 of 1912); (3) income-tax upon royalties reserved by the lease. The Subordinate Judge gave the plaintiffs a decree in respect of all three heads of claim but disallowed the claim for interest. On appeal by the defendants, the District Judge of Burdwan (7th December 1932) disallowed the claim in respect of income-tax but upheld the trial Court's decision as to the other two heads of claim. Both sides having appealed to the High Court, Nasim Ali and Edgley JJ. affirmed the decision of the District Judge by decrees dated 24th March 1936. Two appeals to His Majesty have been brought pursuant to certificates granted by the High Court under cl. (c) of Sec. 109, Civil P. C., and they have been consolidated. The defendants by their appeal dispute that they are liable in respect of road and public works cess or the charge under the Mining Settlements Act. The plaintiffs appeal against the disallowance of their claim in respect of income-tax. No question as to interest arises, nor is it contended that there is any reason why the covenant should not have effect according to its tenor.

Learned counsel for the defendants have drawn attention to the fact that the words of the covenant—charged, assessed or imposed upon the said mines or any part thereof—are not accompanied by phrases (to be found in books of conveyancing precedents) designed to enlarge their scope by making express mention of demands imposed in respect of the demised premises or in

respect of the royalties reserved by the lease. (1882) 9 Q B D 632,[1] has been cited to show that the fact that a charge can be enforced against the premises does not in all circumstances make it a charge imposed on the premises; and the observations of Mathew L. J. in (1902) 1 K B 700[2] at p. 711, have been referred to as showing that unless there be express mention of demands imposed on the owner in respect of the premises, such a demand is not within the covenant. As regards the claim for moneys paid under the Cess Act, 1880, their Lordships are of opinion that the terms of that enactment deprive the defendants' contention of its force :

5. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein, except as otherwise in Ss. 2 and 8 provided, shall be liable to the payment of a road cess and public works cess.

6. The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property ascertained respectively as in this Act prescribed . . . . . .

These words, together with the Preamble and other Sections (e. g., S. 80), are to the effect that the cess is levied on the immovable property and that the immovable property is liable to pay it. It is assessed differently as regards lands and mines—in the case of lands it is assessed on the annual value and in the case of mines on the annual net profits. The judgment of the Board delivered by Mr. Ameer Ali in 38 I A 31,[3] has been referred to, but their Lordships are unable to find that it casts any doubt upon the character of the cess as one imposed upon the immovable property by the plain terms of the Act.

The nature of the payment to be made under S. 10 (1) of Bengal Act 2 of 1912 by the persons mentioned in Cl. (b)—"all persons who receive any royalty, rent or fine from such mines" is not so clear. The word "owner" in this Act points in such a case as the present to the lessees and not to the lessors. Expenses incurred by the Mines Board of Health in respect of any area declared to be a "mining settlement" are to be "charged to" the persons mentioned in Cl. (b) and to the lessees in such proportions as the Local Government may direct; the total burden of the lessees is to be divided among them on the basis of output, while the total burden of the receivers of royalties, etc., is to be divided among them on the basis of the road cess payable by each. There is a provision [sub-s. (4)] that "all expenses chargeable under this Section shall be recoverable as if they were arrears of land-revenue." This would subject the defaulter not merely to "certificate procedure" under the Public Demands Recovery Act but also to a sale of his estate or interest under the Land Revenue Sales Acts [Act 11 of 1859, Bengal Act 7 of 1868]. Their Lordships think that the effect of the Act is to distribute the burden of the expenses among the interests (superior and inferior) in the mine. They say nothing upon the question whether a revenue sale for the zamindar's default would affect the interest of his lessees [*cf.* Act 11 of 1859, S. 37] because they are not of opinion that the words "upon the said mines or any part thereof" refer to the interest of the lessees as distinct from that of the lessors. Nor are the plaintiffs concerned in the present case to demonstrate that for default by the lessees there is a remedy against the leasehold interest. Land revenue is certainly a burden "charged, assessed or imposed upon" the land. If the remedy against the land be what makes it so, or be sufficient to make it so, then the payment now in question is related in like manner to the lessors' interest. This conclusion cannot be avoided by contending that the persons referred to in Cl. (b) of S. 10 of the Act of 1912 need not necessarily have any interest in the mine at all. Receipt of "royalty, rent or fine from such mines" prima facie imports such an interest, and in the absence of such interest road cess would not be chargeable under the Cess Act of 1880.

The words "taxes, rates, assessments and impositions whatsoever" are followed by the words "charged, assessed or imposed upon the said mines"—a variety of phrase which is intended to avoid restricting the covenant to cases in which the demand is in the strictest sense "charged upon the land." The phrases are to be taken in their ordinary and natural meaning. In (1888) 13 A C 613[4] the House of Lords had to

1. Allum v. Dickinson, (1882) 9 Q B D 632=47 L T 493=30 W R 930.
2. Foulger v. Arding, (1902) 1 K B 700=71 L J K B 499=86 L T 488=50 W R 417=18 T L R 422.
3. Manindra Chandra Nandi v. Secretary of State, (1911) 38 Cal 372=9 I C 311=38 I A 31 (P C).
4. Payne v. Esdaile, (1888) 13 A C 613=58 L J Ch 299=59 L T 568=53 J P 100=37 W R 273.

interpret the phrase in a statute of limitations

> periodical sums of money charged upon or payable out of any land except moduses or compositions belong to a spiritual or eleemosynary corporation sole.

As moduses were incapable of being charged on land in the sense of being payable out of land or realizable by remedy against the land itself, the phrase "charged upon" was interpreted in a wider sense and as having no technical meaning. It was considered by Lord Herschell that the prima facie and most common meaning would make it applicable only to those cases in which there was some remedy against the land itself, but that it might well be used to describe a burden imposed upon land if a payment has to be made in respect of land and the land can only be enjoyed subject to the liability for that payment. Lord Macnaghten observed :

> The liability to the payment falls upon the occupier or taker for the time being by reason of his occupation. The land carries the liability as a burthen from taker to taker. Beyond all doubt that liability subtracts something from the profitable enjoyment of the land; it must be taken into account on the occasion of a sale, a mortgage, or a lease. An intending purchaser would give so much less purchase-money; an intending mortgagee would strike the amount off the rental in calculating the value of the proposed security, and an intending lessee would offer so much less rent. It seems to me that according to the ordinary understanding of mankind that is a charge upon land which cannot be dissociated from the land and which charges the occupier in respect of the land.

The particular illustration of an intending lessee does not here apply owing to the special nature of the demand in question, but the other illustrations (intending purchaser, intending mortgagee) are applicable and add point to the circumstance that a remedy is given against the land itself. Their Lordships see no features in the present case rendering these considerations insufficient to attract the operation of the covenant and are of opinion that the High Court was right in holding that this part of the plaintiffs' claim is well founded. Income-tax is in a very different position, as intending purchasers or mortgagees of the lessors' interest would appreciate. It is not a tax imposed upon the mines in any sense relevant to the lessees' covenants in a mining lease. Indeed, express words referring to public demands imposed upon the proprietors in respect of the mine would not have brought income-tax within the covenant. It may be true that the suggestion that the covenant extends to income-tax in respect of the plaintiffs' royalties would not in 1915 seem so unreasonable as it would after the Indian Income-tax Acts of 1918 and 1922 had graduated the tax according to the amount of the assessee's total income. But a general tax on the income of all persons with exceptions for smaller incomes is plainly outside the scope of the covenant. The result is that in their Lordships' opinion both appeals should be dismissed. They will humbly advise His Majesty accordingly. There will be no order for costs.

R.M./R.K. *Appeals dismissed.*

Solicitors for Appellants — Sanderson Lee & Co.

Solicitors for Respondents — Stanley Johnson & Allen.

A. I. R. 1938 Privy Council 245

(From Oudh : A I R 1937 Oudh 99)

8th July 1938

LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Rana Uma Nath Bakhsh Singh — Appellant.

v.

Jang Bahadur — Respondent.

Privy Council Appeal No. 29 of 1938; Oudh Appeal No. 23 of 1936.

Trust — Creation of — *S*, a Hindu taluqdar, executing a deed of relinquishment, relinquishing all his rights and property to his eldest son (defendant)—Second deed executed by defendant alone — Latter deed, besides other arrangements, providing to give a sum of money and a village to *J*, a son of Mahomedan concubine of *S*, on his attaining majority provided he remained obedient — Two deeds held created trust in favour of *J*—*J* forced to leave village with his mother — Fact that *J* did not come and pay his compliments to defendant on occasions of Hindu festivals held no proof of breach of condition to remain obedient.

A Hindu taluqdar *S* executed two instruments. One was a deed of relinquishment by which the taluqdar *S* relinquished all his rights and property to the eldest son (defendant). The second instrument (ikrarnama) was executed by the defendant alone. That deed, while providing for maintenance and debts of the defendant's father and mother, arranged to pay certain sum and a village to a son *J* of a Mahomedan concubine of the defendant's father, on his attaining majority, provided he remained obedient. The deeds were followed by mutation proceedings. *S* died and after some years the concubine and her son *J* were turned out. They went to live with their own people. Subsequently when *J* attained majority, he filed a suit against the defendant for the possession of the village and the amount promised. The defence was that *J* had not fulfilled the condition of

remaining obedient, as he failed to come and pay compliments to the defendant on the occasion of Hindu festivals. There was no evidence that defendant intimated the plaintiff that he desired his company on those occasions:

Held that the two instruments should be read together and the obligations undertaken by the defendant were the terms upon which his father was surrendering to him immediately all his property. Moreover the amount and the village promised to *J* intended to come out of the property surrendered. In these circumstances the instrument created a trust in favour of *J*. The defence could not be regarded as establishing a breach of the condition "provided he remained obedient." Hence the plaintiff was entitled to a decree: *11 M I A 517 (P C); 16 Mad 268 (P C); 32 All 410; A I R 1918 P C 156 and A I R 1922 P C 107, Rel. on.* [P 247 C 1, 2; P 248 C 1]

A. M. Dunne and W. Wallach — *for Appellant.*

R. Roxburgh, Siraj Husain and L. M. Jopling — *for Respondent.*

Sir George Rankin.—

RANA SIR SHANKER BAKHSH SINGH
(born in 1840, died in 1897)

Lal Chandra Bhukhan Singh (died on 7th August 1894)	Rana Sir Sheoraj Singh (died on 14th April 1920)
Rana Uma Nath Bakhsh Singh (Appellant)	Kunwar Shambhu Nath Bakhsh Singh

Rana Sir Shanker Bakhsh Singh was taluqdar of Khajurgaon. In 1890 he had made a will appointing his eldest son Lal Chandra as his successor, but Lal Chandra having died in 1894 a new disposition was made by Sir Shanker Bakhsh Singh by a codicil dated 1st November 1894. By this codicil he gave to Sheoraj, his younger son, all his property, moveable and immovable, including the Khajurgaon estate but purported to provide that Sheoraj should not have power to make any son except Uma Nath Singh, his eldest son, the owner and successor to the estate "during his presence." It is unnecessary to discuss the effect in law of this provision. Sir Shanker Bakhsh Singh having died in 1897 was succeeded by Sheoraj who became Sir Sheoraj Singh, K. C. I. E. On 9th May 1913 two instruments were executed. The first was a deed of relinquishment (dastbardari) to which the parties were Sheoraj, Uma Nath (the defendant-appellant) and Shambhu Nath, his brother. By this deed, Sheoraj relinquished all his rights and property to the defendant-appellant and purported to put him in possession forthwith. The deed provides that the defendant-appellant should pay the debts of Sheoraj and should be entitled to receive and collect all debts due to him. By its sixth clause it referred to the contemporaneous instrument:

(6). That I, the declarant No. 2 (Uma Nath), do hereby agree that I shall continue to act according to the conditions laid down in the deed executed today by me in favour of the declarant No. 1 (Sheoraj).

The second instrument, described as an ikrarnama or agreement, was executed by Uma Nath alone. It recites that Sheoraj, his father, had appointed him successor and put him in possession; it provides that a certain village should be set aside for the maintenance of Sheoraj who was to get in addition a sum of Rs. 7045 in cash and a further sum after all his debts had been satisfied. Uma Nath by this deed also promised to pay Rs. 3000 annually to the wife of Sheoraj and a sum of Rs. 2000 annually to Mt. Sarwar, a concubine who lived at Khajurgaon and who had two sons by Sheoraj — viz. the plaintiff Jang Bahadur and Bam Bahadur. Cl. (4) of the ikrarnama is as follows:

(4). That I, the executant, shall pay Rs. 50,000, as specified below, in cash to Jang Bahadur and Bam Bahadur, minor sons of the aforesaid prostitute, Mt. Sarwar, on their attaining majority provided they remain obedient: Jang Bahadur Rs. 30,000, Bam Bahadur Rs. 20,000. After their attaining age of majority, I shall put Jang Bahadur in possession of village Mathiapur, pargana Dalmau and Bam Bahadur in possession of village Udwamao, pargana Sareni with the right of inheritance but without the power of making transfer. The aforesaid persons and their heirs shall continue to pay from the date of their possession, land revenue, cesses and subscriptions of the British Indian Association and Canning College, along with the additional amount of Rs. 10 per cent. by way of proprietary right, on the land revenue, to me, the executant, and my heirs. Except receiving the aforesaid amount in cash and remaining in possession of the villages, mentioned above, the aforesaid persons shall not be entitled to get any guzara or allowance from the estate. If for any reason I may not be able to deliver possession of village Mathiapur to Jang Bahadur, then I shall put him in possession of another village, having the same amount of profits and being of the similar quality, according to the above-mentioned condition.

These deeds were immediately followed by mutation proceedings whereby the name of Uma Nath was substituted for that of Sheoraj in the revenue papers. On 14th April 1920 Sheoraj died. At some time—apparently between 1924 and 1927—Mt. Sarwar and her sons left Kharjurgaon and went off to live with her own people in

another village. The plaintiff respondent Jang Bahadur and his young brother Bam Bahadur were both minors at this time, but Jang Bahadur attained his majority on 2nd May 1930. On 7th September 1931, Jang Bahadur brought the suit out of which the present appeal arises against the appellant Uma Nath claiming the sum of Rs. 30,000 under cl. (4) of the deed of 9th May 1913, and also possession of the village Mathiapur or another village of like value according to the terms of the deed. A great many issues were framed by the learned Subordinate Judge and discussed at the trial, but in the end the learned Judge came to the conclusion that the plaintiff was not entitled to any decree for possession of the village or for a declaration of any title thereto. He also found that the plaintiff was not entitled to a decree for Rs. 30,000 claimed, because he had not fulfilled the condition of *ita'at*—that is, the condition as to obedience mentioned in cl. (4) above recited. On appeal to the Chief Court of Oudh, Nanavutty and Zia-ul-Hasan JJ. allowed the appeal and gave the plaintiff a decree for possession of the village of Mathiapur and for Rs. 30,000 against the defendant with certain interest, mesne profits and costs. From this decree the defendant has appealed to His Majesty.

Having regard to the fact that the plaintiff Jang Bahadur was not a party to either of the two instruments of 9th May 1913, the first question which arises is whether or not cl. (4) above recited of the instrument which was executed by the appellant alone amounts to a trust in Jang Bahadur's favour so as to entitle him to claim to have the trust performed. It is reasonably plain, as the Courts in India have held, that the two instruments must be read together, and that the obligations undertaken by the appellant are the terms upon which his father was surrendering to him immediate possession of all his property. Moreover the provision for Jang Bahadur of a village and of Rs. 30,000 is intended to come out of the property which was being surrendered. In these circumstances a number of decisions by this Board have made it difficult for learned counsel for the appellant to contest the proposition that the instruments created a trust in favour of Jang Bahadur : 11 M I A 517[1] at p. 549, 20 I A 9.[2] 37 I A 152,[3] 46 I A 64[4] and 49 I A 153[5]. Their Lordships are in agreement with the learned Judges of the Chief Court in holding that the effect of cl. (4) above cited was to create a trust in favour of the plaintiff enforceable at his instance. This leaves as the only defence remaining to the appellant the condition expressed in the clause by words which, as they appear in the translation before their Lordships, are, "provided they remain obedient". The learned Subordinate Judge was of opinion that the word "*ita'at*" generally implies submissive obedience, which he explains as "such solicitous and affectionate attendance and dutifulness as one would expect from a very near and dear relation." The learned Subordinate Judge concluded that the plaintiff must fail as regards the sum of Rupees 30,000 because he had given no evidence to prove the performance of *ita'at*, and because he had not cross-examined the defendant whose complaint took the form that the plaintiff had never offered any nazar at the time of Holi or Dasehra, or other festival, nor visited the defendant even when the defendant was ill. The learned Judges of the Chief Court read the condition in the clause as meaning that the plaintiff and his brother would be entitled to the money on condition of their remaining loyal to the defendant and considered that there was nothing to show that the plaintiff had committed any act of disloyalty. Their Lordships are unable to hold that the complaints made by the defendant of the plaintiff's conduct towards him can be regarded as establishing a breach of the condition "provided they remain obedient". The evidence of the plaintiff's mother and her brother to the effect that some four or six years after the death of Sheoraj she and her two boys were turned out by the defendant has an important bearing, as the Chief Court rightly thought, upon this question. It seems reasonably clear that the position of the woman and her sons at Khajurgaon was a very difficult one and

1. Nawab Umjad Ally Khan v. Mt. Mohumdee Begam, (1866-67) 11 M I A 517=10 W R 25 =2 Sar 315=2 Suther 98 (P C).

2. Sri Lakshmi Narayana Ananga Garu v. Sri Durga Madhawa Deo Garu, (1893) 16 Mad 268=20 I A 9=6 Sar 270 (P C).

3. Nawab Khwaja Muhammad Khan v. Husaini Begam, (1910) 32 All 410=7 I C 237=37 I A 152=7 A L J 871 (P C).

4. Raja of Ramnad v. Sundara Pandiyasami Tevar, (1918) 5 A I R P C 156=49 I C 704= 42 Mad 581=46 I A 64 (P C).

5. Soleman Quadir v. Salimullah Bahadur, (1922) 9 A I R P C 107=69 I C 138=49 Cal 820=49 I A 153 (P C).

the fact of her being a Mahomedan created further difficulties; not unnaturally her sons become Muslims.

This change of religion would not excuse them from fulfilling the condition as to obedience but the circumstances taken as a whole throw doubt upon the reality of the defendant's complaint. It seems doubtful if the plaintiff's attendance at ceremonies would have been welcomed and in any case there is no trace of any request having been made by the defendant to the plaintiff or of any intimation that the defendant desired his company or his attendance. The mere complaint therefore that the plaintiff did not come from the place where his mother was living and pay certain compliments to the defendant on the occasion of certain Hindu festivals is singularly unimpressive, and whether the word *'ita'at'* be translated "obedience" or "loyalty", their Lordships are satisfied that this condition affords no defence to the appellant in this case. Their Lordships are of the opinion that this appeal fails and should be dismissed. They will humbly advise His Majesty accordingly. The appellant must pay the costs of the respondent.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellant — Hy. S. L. Polak & Co.

Solicitors for Respondent—Nehra & Co.

A. I. R. 1938 Privy Council 248

(From Calcutta)

18th July 1938

LORD THANKERTON, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Dinabandhu Chatterjee — Appellant.

v.

Ashutosh Chatterjee and others — Respondents.

Privy Council Appeal No. 28 of 1937; Bengal Appeal No. 26 of 1935.

Bengal Land Revenue Sales Act (11 of 1859), Ss. 2 and 3—In pursuance of S. 3, 12th January and 28th March fixed in tauzi ledger as latest dates in each year for payment of arrears of land revenue—Sum demanded as payable in respect of January kist not paid before 12th January — Sale held after 12th January is within jurisdiction of Collector.

The expression 'kist', as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, where in pursuance of S. 3, the Board of Revenue has, in tauzi ledger, fixed for an estate paying an annual revenue, 12th January and 28th March in each year as the latest dates, on or before which, an arrear of land revenue must be paid, the expression "January kist" means the period beginning on 29th September and ending on 12th January, and the "kist day" means the latest day of payment on which that period expires, that is 12th January. Hence where a sum is demanded as payable in respect of January kist and is not paid on or before 12th January, the date fixed for the payment of arrears, the estate becomes liable to sale, and the sale held on 22nd March after the latest date for payment of arrears, is within the jurisdiction of the Collector : *A I R 1931 P C 51, Expl. and Disting.* [P 250 C 1, 2]

J. M. Pringle — *for Appellant.*

J. M. Parikh — *for Respondents.*

Sir Shadi Lal.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated 21st June 1935, which reversed the judgment and decree of the Second Subordinate Judge of Faridpur dated 13th August 1932, and set aside the sale of an estate for arrears of land revenue. On 22nd March 1930, a permanently settled estate, bearing tauzi No. 299 of the Backergange Collectorate, was sold by public auction for arrears of land revenue. Three persons, namely Ashutosh Chatterjee, Rai Rajni Kanta Chatterjee and Suresh Chandra Chatterjee, were proprietors of that estate, each owning one-third share therein. The total land revenue assessed on the estate is Rs. 13-1-1, of which Rs. 5-8-10 has to be paid by 12th January of each year, and the remainder Rs. 7-8-3 by 28th March. It is common ground that in respect of the amount of Rs. 5-8-10 which was payable on or before 12th January 1930, two co-sharers, namely the plaintiff, Ashutosh Chatterjee and defendant 2, Rai Rajani Kanta Chatterjee, duly paid their share of the revenue, but the third co-sharer, Suresh Chandra Chatterjee, failed to make any payment. There stood however to the credit of the estate 9 annas and 9 pies, which had been overpaid on account of the previous instalments. After giving credit for this small sum, the Collector found that there was a deficit of Re. 1-3-9 in the amount of land revenue, which was to be paid by 12th January 1930. The estate was therefore entered in the Arrear List of the Collectorate, and sold on 22nd March 1930, for Rs. 700 to the appellant, Dinabandhu Chatterjee, who was the highest bidder at the auction. Thereupon, Ashutosh Chatterjee impeached the sale on various grounds;

and after an unsuccessful appeal to the Commissioner, he brought the present suit in the Civil Court against the auction-purchaser and his own cosharers in the estate. The main ground, upon which the sale was attacked, was that the Collector had no jurisdiction to hold the sale on 22nd March 1930. This ground of attack was repelled by the purchaser, and the dispute between the parties was embodied in the following issue framed by the Court :

> Was the sale of Taluk No. 299 by the Collector of Backergange on 22nd March 1930, at revenue sale, illegal, without jurisdiction, and contrary to the provisions of Act 11 of 1859?

This issue was answered in the negative by the trial Judge, who upheld the sale and dismissed the suit. On appeal to the High Court, his judgment was set aside, and the suit was decided in favour of the plaintiff. From the judgment of the High Court the auction-purchaser has brought this appeal to His Majesty in Council, and the question which their Lordships have to determine, is whether the sale was held on a date before the latest date fixed for the payment of the arrear of revenue. What is the law which defines an arrear of revenue, and which determines the date upon which an arrear must be paid, the consequence of non-payment thereof on that date being that the estate in arrear becomes liable to sale at public auction? The law on the subject is contained in the Bengal Land Revenue Sales Act 11 of 1859. By S. 2 of that statute, it is provided that :

> If the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue.

This Section refers to the kist or instalment of land revenue fixed in accordance with the terms of settlement and kistbandi of an estate, and contemplates the payment of a kist or instalment every month. It then defines an arrear of revenue. If the whole or a portion of a kist or instalment of revenue is not paid on, or before, the last day of the month, during which it was to be paid, the sum remaining unpaid on the first day of the following month shall be deemed to be an arrear of revenue. It will be observed that the Section merely defines an arrear of revenue. It makes it clear that the proprietor of an estate is allowed to pay a kist or instalment on any day during the month for which it has been fixed. The Section does not impose any penalty for the non-payment of the revenue during the month; it merely states that if it has not been paid during the month in which it was to be paid, the sum remaining unpaid becomes on the first day of the following month an arrear of revenue. But the defaulting proprietor does not suffer any harm, even if he does not pay immediately the revenue so declared to be in arrear. The law gives him a period of grace for payment, and this concession is granted by S. 3 of the statute, which is in these terms :

> Upon the promulgation of this Act the Board of Revenue shall determine upon what dates all arrears of revenue . . . shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts . . . shall be sold at public auction to the highest bidder.

In pursuance of S. 3, the Board of Revenue has fixed for an estate paying an annual revenue exceeding Rs. 10, but not exceeding Rs. 50, the 12th January and 28th March in each year as the latest dates, on or before which, an arrear of land revenue must be paid. It is only when the latest date for the payment fixed under the Section has expired without payment, that the estate becomes liable to sale at public auction on a date thereafter which may be fixed for the purpose. The question therefore arises whether the sale in dispute was held after the expiry of the last date of payment as contemplated by the aforesaid Section. Now Ex. C, which is a certified copy of the kistabandi relating to this estate, shows that Rs. 13-1-1, the total revenue assessed on the estate, is payable in monthly instalments according to the Bengali era, that is to say, the revenue is payable by instalments each month from Baisakh to Chaitra. These instalments are called kists in S. 2 of the Act, and if any instalment is not paid during the prescribed month, the sum so unpaid becomes an arrear on the first day of the following Bengali month. But, as already stated, the mere fact that there is an arrear to be paid in respect of as estate does not lead to any untoward consequence until the expiry of the last date of payment fixed under S. 3. As the mere failure to pay each instalment in the prescribed month does not entail any penalty, the details of the monthly instalments were omitted from the tauzi ledger of an estate, and only the demand for arrears, for which the estate would become liable to sale after the latest date of payment, was entered in the tauzi ledger.

The tauzi ledger of this estate mentions Rs. 5-8-10 as the net demand payable in respect of the January kist. The expression "kist," as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, in the case of this estate, which paid revenue in two instalments the expression "January kist" means the period beginning on 29th September and ending on 12th January and the "kist day" means the latest day of payment on which that period expires—now 12th January 1930, as shown in the tauzi ledger, was the latest date for payment of that sum. But it appears from the tauzi ledger that of the aforesaid net demand, Rs. 4-5-1 were duly paid on or before 12th January 1930; and that only Re. 1-3-9 remained unpaid on the last day fixed for the payment of arrears. On the expiry of that day the estate became liable to sale by public auction, and the sale on the date in question, namely 22nd March 1930, did not infringe the law.

The judgment of this Board in 10 Pat 496[1] shows that their Lordships thought that the sum for the non-payment of which the property was sold in that case was a kist as contemplated by S. 2 of the Act, and that 28th March was the date fixed for the payment of the kist. They accordingly held that the sum did not become an arrear until 1st April. The sale held before 7th June, the last date fixed for the payment of arrears, was therefore invalid. That judgment cannot be taken as displacing the meaning which their Lordships have, in the present case, shown to attach to the entry of the date 12th January 1930, under the head "date" in the tauzi ledger. It is to be observed that the appeal in that case was heard ex parte and the meaning of the entry "28th March" and of the references to "kist" was not examined in the light of the information now available. Moreover the evidence in that case included the sale proclamation issued under S. 7 of the Act, which was misleading. The case must therefore be regarded as proceeding upon its own facts.

The learned Judges of the High Court, who decided the present case, have wrongly assumed that what is called a net demand in the tauzi ledger in respect of the estate in question was a kist as contemplated by S. 2, and that the kist was payable in January and became an arrear on 1st February. They think that the latest date for the payment of an arrear, accruing on 1st February, was 28th March 1930, and that the sale, which was held on 22nd March 1930, was therefore held before the date on which the estate incurred the liability to sale. The reasoning of the learned Judges is faulty, as it involves the assumption that Rs. 5-8-10, for the payment of which 12th January was fixed, was an instalment under S. 2 of the Act; while it was an arrear of revenue, for the payment of which 12th January 1930 was fixed under S. 3. In the event of non-payment on, or before, the date fixed for the payment of arrears, the estate became liable to sale, and the sale which was held on 22nd March 1930, after the latest date for payment of arrears, was within the jurisdiction of the Collector. The result of the above discussion is that the appeal should be allowed, the decree of the High Court dated 21st June 1935 set aside, and the decree pronounced by the trial Judge on 13th August 1932 restored with costs here as well as in the High Court. Their Lordships will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellant — Barrow Rogers & Nevill.

Solicitors for Respondents — T. L. Wilson & Co.

1. Mt. Saraswati Bahuria v. Surajnarayan Chaudhuri, (1931) 18 A I R P C 57=130 I C 676=10 Pat 496 (P C).

***A. I. R. 1938 Privy Council 250**

(From Oudh)

14th July 1938

LORDS WRIGHT, ROMER AND PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Oudh Commercial Bank, Ltd., Fyzabad — Appellant.

v.

Pandit Bishambhar Nath Bajpai — Respondent.

Privy Council Appeal No. 11 of 1937; Oudh Appeal No. 7 of 1936.

*** Decree—Construction—Decree amount to be paid in monthly instalments—On default of three consecutive instalments decree-holder entitled to take out execution — Judgment-debtor paying third of every series of three instalments without specifying expressly that they were for those instalments—Decree-holder held entitled to take out execution.**

A decree which was agreed to be paid in monthly instalments provided that if the judgment-debtor did not pay three consecutive instalments, the decree-holder shall have power to take out execution in respect of the remaining entire amount due. In no other case the decree-holder shall have power to execute the decree against the judgment-debtor. The judgment-debtor paid the third of every series of three instalments without expressly specifying that he was paying that particular instalment and claimed that he had not committed default in respect of three consecutive instalments :

Held that where the third instalment of the first series of three instalments was paid, it was in fact and in law a payment of the first instalment, and as such there were three consecutive instalments unpaid, viz. second, third and fourth and so on. Hence the decree-holder was entitled to take out execution. [P 252 C 1]

J. P. Eddy and M. H. Rashid — *for Appellant.*

Lord Wright. — This is an appeal from a decree dated 2nd January 1936, of the Chief Court of Oudh at Lucknow, dismissing the appeal of the appellant with costs. The dismissal was by a majority judgment of two against one. The question turns on the construction of a document of compromise and the true effect in law to be attached to what was done under that document. The appellant had recovered judgment by a simple money decree against three defendants in the Court of the Additional Subordinate Judge at Unao on 5th October 1926. The amount awarded under that judgment was the sum of Rs. 12,819 with interest at the rate of 6 per cent. until payment. On 6th January 1927 a compromise was agreed upon between the appellant and the respondent. That compromise was sanctioned by the Subordinate Judge at Unao by an order of 3rd February 1927. The difficulty which has arisen is in respect of the true meaning of the compromise and the true effect to be given to the action which was taken under it. The compromise, which is signed by the respondent, is as follows: It is headed with the name of the action and says :

In the above-noted suit a settlement has been arrived at between the Oudh Commercial Bank, decree-holder and the applicant-judgment-debtor to satisfy the decree on these lines : (1) That the applicant judgment-debtor will continue to pay Rs. 200 monthly as instalment towards the decretal money. The first instalment will be paid at the end of January 1927, and this instalment will be of Rs. 500 only, the rest of the instalments shall be of Rs. 200 per month. If the applicant judgment-debtor does not pay three consecutive instalments, the decree-holder shall have power to take out execution in respect of the remaining entire amount due. In no other case the decree-holder shall have power to execute the decree against the applicant.

Clause (2) provided for an increase of interest from Rs. 6 per cent. per annum to Rs. 8 per cent. per annum. There were also terms entitling the appellant to execute the decree against the other judgment-debtors. The application to execute the decree, out of which these proceedings arose, was made to the Court on 9th August 1933. It recites that an application had been filed on 15th February 1930, which was dismissed on 10th December 1930. It was for execution to issue against the respondent in respect of a sum of Rs. 10,758-5-3, together with various costs. That was arrived at by bringing into account the original amount of the decree with the addition of the interest unpaid and giving credit for the actual payments made in reduction, which amounted to Rs. 7868-12-0, and leaving the balance in respect of which it was sought to have execution. Various objections were lodged by the respondent and, considering these objections, it is perfectly clear that the point taken by the respondent was that the compromise fixed the relations between the two parties and that on the terms of the compromise there had been no failure by the respondent to fulfil the terms of the compromise and therefore that there was no right to issue execution in respect of the judgment debt or any part of it. The respondent relied upon the term that no execution could be issued against him except in the case that the judgment-debtor did not pay three consecutive instalments. He relied upon the fact that, after the date of the compromise, in addition to the first payment under the compromise of Rs. 500 he had paid three consecutive instalments of Rs. 200 each and he relied on the fact that he had never come within the terms that he had not paid three consecutive instalments, because in respect of every series of three instalments, which he seems to have separated out, he had paid the third instalment of the three : for instance if instalments were due respectively in January, February and March, his case was that he had actually paid the March instalment and that he had not failed to pay three consecutive instalments : then, taking the following quarter of the year, he had paid the June instalment, though he had not paid the April and May instalments. That was his contention and that was the matter which was discussed at

considerable length in the judgments appealed from. This though ingenious is somewhat disingenuous because payment of Rs. 800 a year would barely, if at all, pay the interest.

Their Lordships however are unable to accept this contention. In their Lordships' judgment the respondent is in the position in fact that he has not paid three consecutive instalments and therefore he is in default under the compromise agreement, and the appellant, as decree-holder, has accordingly power to take out execution in respect of the remaining entire amount due. In their Lordships' opinion the matter may be tested by taking a simple concrete case. Let it be assumed that there are instalments due in January, February and March and that when March comes the respondent, not having paid the January or February instalment, pays Rs. 200. He pays no more in respect of that quarter. Then April comes and he pays nothing; then May comes and he pays nothing; June comes and then he pays Rs. 200. In their Lordships' opinion of those facts, the payment which is made in March is in law a payment not of the March instalment, but of the January instalment. That is the position as the evidence stands. It is perfectly true that the respondent might have paid the instalment which he did tender in March but on the express terms that it was a payment of the March instalment and not of the January or February instalment. The question would then arise whether the appellant was bound to accept a tender made in that way. That question does not arise and in their Lordships' opinion, when the instalment was paid in March, it was in fact and in law a payment of the January instalment. It follows from that that, when April came and no payment was made, there were three consecutive instalments unpaid, that is to say the February instalment, the March instalment and the April instalment, and so on. In these circumstances, in their Lordships' opinion the case ought to be decided on the footing that there has been default by the respondent in carrying out the compromise agreement and that the remaining entire amount due is claimable. The result is that the appeal must be allowed with costs, and the case remitted to the execution Court to proceed with the execution as the facts of the case require, and their Lordships will humbly advise His Majesty accordingly. The judgment-debtor must pay to the appellant the costs of the execution application in the Court of the Additional Subordinate Judge and of the appeal to the Chief Court. These costs will be added to the amount for which execution is directed.

K.S./R.K. *Order accordingly.*

Solicitors for Appellant—Nehra & Co.

A. I. R. 1938 Privy Council 252

(From Oudh)

22nd July 1938

LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Rani Huzur Ara Begam and another—Appellants.

v.

Deputy Commissioner, Gonda, and others—Respondents.

Privy Council Appeal No. 61 of 1937; Oudh Appeals Nos. 13, 14, 15 and 16 of 1936.

Oudh Estates Act (1 of 1869), Ss. 7, 8, 10—Entry of taluqdar in list 2 prepared under S. 8—Entry, while conclusive evidence that taluqa is governed by custom of single heir succession, also governs succession to non-taluqdari property—Only difference is presumption in case of non-taluqdari property may be rebutted.

Whereas the entry of a taluqdar in list 2 prepared under S. 8 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. The only difference is that, while in the case of taluqdari estate there is an irrebuttable presumption in favour of the rule of devolution on a single heir, the presumption in the case of non-taluqdari immovable property may be rebutted by evidence proving a different rule. The object of Sec. 7 in making special provision for the devolution of heirlooms mentioned in the inventory prepared under it, is no doubt to enable the taluqdar to ensure that the heirlooms mentioned in the inventory should pass along with the estate in all circumstances, but it does not warrant the inference that the Legislature intended that the descent of moveable property, for which no inventory was made, should be governed by the ordinary law: *A I R 1916 P C 89 and 10 Cal 792 (P C), Rel. on.* [P 253 C 2; P 254 C 1]

J. P. Eddy, M. H. Rashid and M. P. Srivastava — *for Appellants.*

L. P. E. Pugh, S. Hyam, Cyril Radcliffe, W. Wallach, C. R. Russell and C. Sidney Smith — *for Respondents.*

Sir Shadi Lal. — Raja Mohammad Mumtaz Ali Khan, taluqdar of the Utraula Estate in the District of Gonda of the Oudh Province, obtained on 22nd April 1930, against Raja Saadat Ali Khan, taluqdar of

the Nanpara Estate, two decrees for the recovery of certain sums of money. These decrees were based upon an award made by the Commissioner of Lucknow Division on 8th April 1930. The award after finding the amounts of money due to the taluqdar of Utraula, concluded as follows :

> The payment of the annuity to the Raja of Utraula will cease on his death. But should his death occur before the liquidation of the arrears amounting to Rs. 2,09,919, payment of these arrears will be completed to his heirs.

Raja Mohammad Mumtaz Ali Khan died on 4th March 1934, leaving him surviving four persons who were his heirs under the Mahomedan law ; namely his widow Rani Huzur Ara Begam, his minor daughter Rajkumari Fatma Begam, and two minor sons Raja Mohammad Mustafa Ali Khan and Iqbal Ali Khan. On 18th September 1934, the widow, Rani Huzur Ara Begam, on behalf of herself and as guardian of her daughter, filed in the Chief Court of Oudh two applications for execution of the two decrees. The total amount, for which execution was sought, was Rs. 1,85,925-2-8 with reference to one decree, and Rupees 11,43,227-5-4 with reference to the other decree. The applications expressly stated that they were made by the widow in her personal capacity and as guardian of her minor daughter, and also for the benefit of the two minor sons. The judgment-debtor challenged the right of the widow to execute the decrees obtained by her husband. Her right was disputed also by the Deputy Commissioner of Gonda who, as the representative of the Court of Wards, was in charge of the persons and properties of the two minor sons. He asserted that under the law and the family custom of single heir succession, the estate of Raja Mohammad Mumtaz Ali Khan, including his rights under the decrees, devolved on his elder son Raja Mohammad Mustafa Ali Khan alone ; and that neither the widow nor his other children were entitled to succeed to any portion of his estate. He accordingly denied the right of the applicant to execute the decrees.

Now the taluqdar of the Utraula Estate is named in list 2 of the taluqdars prepared under S. 8, Oudh Estates Act, 1 of 1869, whose estate, according to the custom of the family on or before 13th February 1856, ordinarily devolved upon a single heir. S. 10 of the Statute provides that the Court shall take judicial notice of the said list and regard as conclusive the fact that the person named therein is such taluqdar. In other words, there was a pre-existing custom attaching to the estate on which its inclusion in list 2 was based. There is therefore an irrebuttable presumption in favour of the existence of the custom of the family by which the estate devolves on a single heir, but the provision as to the conclusiveness of the custom is confined to the estate coming within the ambit of the Statute. It does not apply to any property which is not comprised in the estate or taluqa. What is the rule which governs succession to non-taluqdari property ? If immovable property forming part of the taluqa is governed by the custom of single heir succession, there is no prima facie reason why immovable property, which is not comprised in taluqa, should follow a different rule. Indeed it has been decided by this Board that there is a presumption that the rule as to succession to a taluqa governs also the succession to non-taluqdari immovable property : 43 I A 269.[1] It must therefore be taken as a settled rule that, whereas the entry of a taluqdar in list 2 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. The only difference is that, while in the case of taluqdari estate there is an irrebuttable presumption in favour of the rule of devolution on a single heir, the presumption in the case of non-taluqdari immovable property may be rebutted by evidence proving a different rule. The question then arises whether there is any other rule in the matter of succession to the non-taluqdari moveable property left by the taluqdar. As observed in 11 I A 135[2] at p. 148 :

> Their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluka to the law relating to all other family property, and says there is a presumption from the actual decisions relating to the taluqa that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to show that the other family property followed a line of devolution different from that of the taluqa.

Their Lordships' attention has been invited to S. 7 of the Act which provides that if a taluqdar or grantee desires that

1. Murtaza Husain Khan v. Mahomed Yasin Ali Khan, (1916) 3 A I R P C 89=36 I C 299=38 All 552=19 O C 290=43 I A 269 (P C).
2. Thakur Ishri Singh v. Baldeo Singh, (1884) 10 Cal 792=11 I A 135=13 C L R 418 (P C).

any elephants, jewels, arms or other articles of moveable property belonging to him should devolve along with his estate, he should make an inventory thereof and deposit it in the office of the Deputy Commissioner of the district wherein his estate is situated. Thereupon the articles mentioned in the inventory shall be enjoyed and used by the person who under, or by virtue of, the Act may be in actual possession of the said estate. It is argued that the necessity for making this special provision for the devolution of heirlooms mentioned in the inventory arose because the Legislature contemplated that moveable property of a taluqdar would devolve, not on a single heir along with the estate, but upon the persons who might be his heirs under the ordinary law. Their Lordships think that the object of the Section was to enable the taluqdar to ensure that the heirlooms mentioned in the inventory should pass along with the estate in all circumstances, but it does not warrant the inference that the Legislature intended that the descent of moveable property, for which no inventory was made, should be governed by the ordinary law. The result is that the non-taluqdari property, immovable as well as moveable, is governed by the custom applicable to the taluqa, as there is no evidence to prove a custom to the contrary. The judgment of the Court of Appeal, dissenting from that of the single Judge, of the Chief Court of Oudh, must therefore be affirmed. Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs to be paid to the respondent the Deputy Commissioner as representing the elder son, Raja Mustapha Ali Khan, the owner of the Utraula estate.

V.B.B./R.K. *Appeals dismissed.*

Solicitors for Appellants—Nehra & Co.

Solicitors for Respondents — Barrow Rogers & Nevil, Solicitor, India Office and Hy. S. L. Polak & Co.

*** A. I. R. 1938 Privy Council 254**

(From Calcutta)

18th July 1938

LORDS THANKERTON, ROMER AND SALVESEN, SIR LANCELOT SANDERSON AND SIR GEORGE RANKIN.

Smt. Rajlakshmi Dassi — Appellant.

v.

Bholanath Sen and others — Respondents.

Privy Council Appeal No. 107 of 1936; Bengal Appeal No. 29 of 1935.

(a) Hindu Law—Reversioner— Possession of person under agreement not binding on reversionary heirs does not affect reversioner's right to possession.

Possession of the estate by a person under an agreement which is not binding on the reversionary heirs, cannot avail him in a question with a reversionary heir whose right to possess cannot arise until the succession opens to such heir. [P 256 C 1, 2]

*** (b) Hindu Law — Reversioner — Widow obtaining decree of her title to estate — Subsequent decree against widow in suit for possession by her in her own interest does not affect reversioner's right to possession.**

A widow obtained a decree of her title to the estate of the deceased ; but in execution of that, entered into a compromise with persons in possession of the property. The compromise and consent decree thereon were declared void and inoperative as against reversionary heirs in a suit filed by the reversioner. Subsequently a suit by the widow in her own interest for possession against the persons in possession was dismissed :

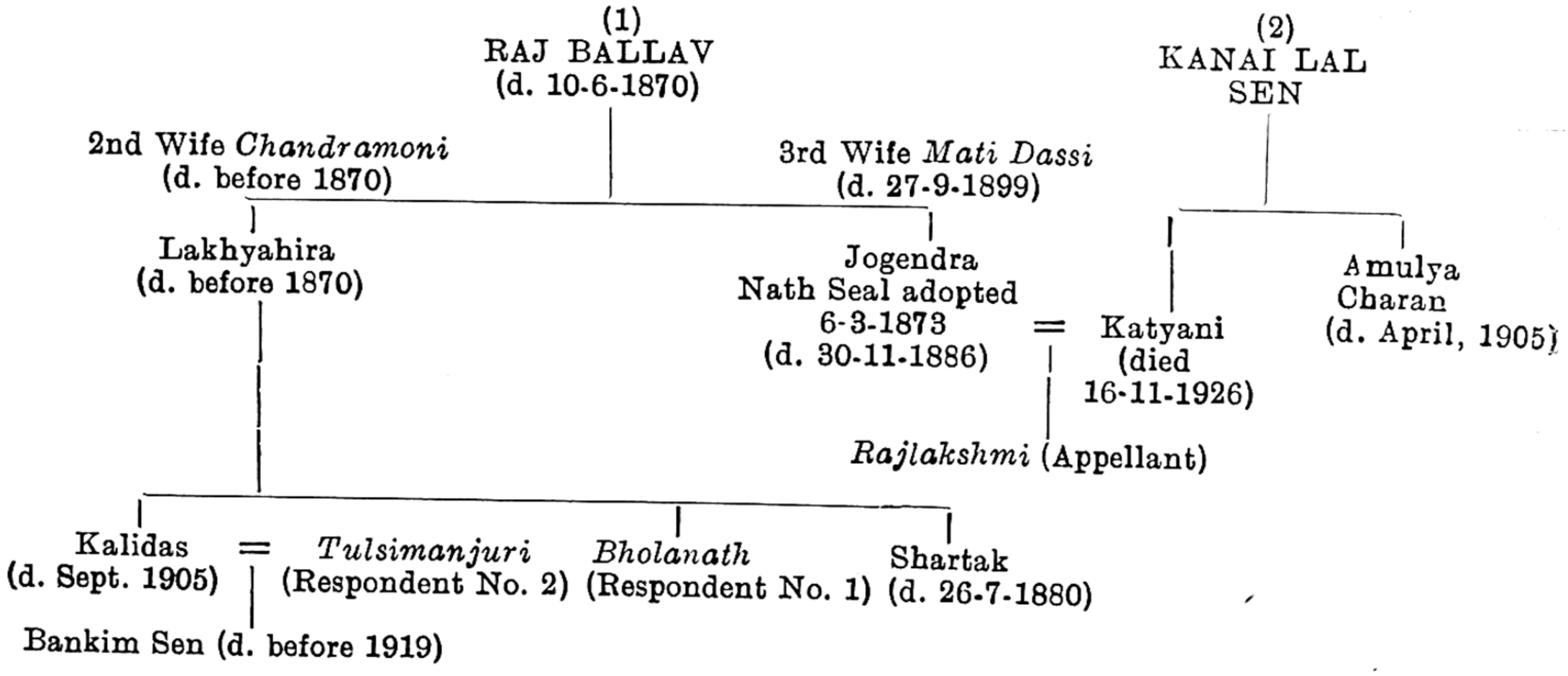
Held that the reversioner's right to possession was established as res judicata against the persons in possession of the estate, that the widow had no right to submit it to a fresh adjudication by the Court so far as the right of the reversionary heirs was concerned and that the decree against her in her suit for possession did not affect the reversioner's right to possession : *Case law referred.* [P 256 C 2 ; P 257 C 1 ; P 258 C 2 ; P 259 C 1]

A. M. Dunne and J. M. Pringle — *for Appellant.*

Respondents Ex parte.

Lord Thankerton. — This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated 8th March 1935, which affirmed the judgment and decree, dated 15th May 1930, of the Special Land Acquisition Judge of the 24 Parganas on a reference made to him under Sec. 18, Land Acquisition Act (1 of 1894) by the Second Land Acquisition Collector, Calcutta. The question in the appeal is whether the appellant is entitled to the compensation money awarded in respect of the acquisition of part of the premises 2, Deb Lane, in the town of Calcutta, as successor to the estate of Raj Ballav Seal, of which the said

premises formed part. Raj Ballav died on 10th June 1870, leaving him surviving his widow Mati Dassi and three grandsons, who were sons of a predeceased daughter by another wife, of whom one died in 1880 unmarried. Respondent 1 is another grandson and respondent 2 represents the third grandson, who died in 1905. The grandsons' line is hereinafter called "the Sens". Respondents 3 to 11 represent the mortgagee of the Sens. The following pedigree shows the descendants of Raj Ballav :



Raj Ballav left a will giving his widow Mati Dassi authority to adopt a son to him and giving benefits to the said widow, to the son to be adopted and to the Sens. On Raj Ballav's death in 1870, Mati Dassi entered into possession of the estate and adopted Jogendra Nath Seal in 1873, under the authority conferred on her. Jogendra married Katyani and the present appellant is their only child; Jogendra died in 1886, when the appellant was less than one year old. Mati Dassi died in 1899 and the Sens appear to have then taken possession of the estate. Shortly after the death of Jogendra, Mati Dassi had purported to adopt Amulya Charan, the brother of Katyani, in further exercise of the authority conferred on her and in 1901 Amulya brought a suit against the Sens and Katyani claiming the estate; the suit was dismissed in both Courts on the ground that Mati Dassi's power of adoption had been exhausted with her adoption of Jogendra and the High Court further held, on construction of the will, that there was an intestacy as to the corpus of the estate, which vested in Jogendra as legal heir and on his death passed by succession to his widow Katyani. In this suit a Receiver had been appointed to the estate pending the disposal of the suit. The decision of the High Court which was dated 28th March 1905 is reported in 32 Cal 861.[1] Meantime, after the decision of the Subordinate Judge in Amulya's suit, Katyani brought Suit No. 11 of 1903 against the Sens, Amulya and the Receiver in Amulya's suit, claiming three-fourths of the estate and partition, which she later amended to a claim for the whole estate, after the decision of the High Court in Amulya's suit. The suit was defended by the Sens and on 21st December 1905, the Subordinate Judge decreed the suit in Katyani's favour, ordering and declaring that the plaintiff's title in the whole 16 annas' share of the immovable properties in dispute as specified in Sch. B (2) of the plaint be declared and she do recover possession therein.

The Sens appealed to the District Court and without authority, joined Kanai, the father of Katyani and Amulya, as respondent in the appeal; they also obtained leave to join a representative of the mortgagee. A petition of compromise was filed in the District Court on 9th January 1907, under which the Sens, with their mortgagee Kanai and Katyani agreed to divide the inheritance, Katyani taking six annas, the Sens four annas, subject to the mortgagee's rights, and Kanai six annas. On 24th January 1907 a consent decree on the basis of the compromise was made by the District Court and partition was directed ; subsequently, on 15th September 1907, as directed by the Court, the Receiver made the partition and made over possession of the respective shares in terms of the compromise. The premises, 2 Deb Lane, compensation for a part of which is the subject

1. Amulya Charan Seal v. Kali Das Sen, (1905) 32 Cal 861=1 C L J 270.

of the present appeal, was included in the four annas of which the Sens got possession.

Less than three months after the consent decree of the District Court in Suit No. 11 of 1903, the present appellant, in order to protect the reversionary interest, instituted on 18th April 1907 Suit No. 59 of 1907 against the parties to the compromise and the Receiver, for declaration that the compromise and the consent decree of the District Court dated 9th January 1907 were void and inoperative and that the reversioners were not bound by the partition proceedings taken in execution of the decree. The Subordinate Judge dismissed the suit, but on appeal the High Court set aside this decision by a judgment and decree dated 8th August 1910, and declared that the consent decree made on 9th January 1907 is void and inoperative as against the plaintiff-appellant and that she is in no way bound by the partition proceedings which have taken place in execution of that decree.

This decision is reported in 38 Cal 639.[2] It is clear that the main ground of decision was that the District Court had no jurisdiction and that accordingly the consent decree was void and inoperative. The Court did not decide any question as to the right of the Sens to retain possession of the four annas during the life of Katyani who had a widow's right in the estate, because of the compromise agreement, to which she was a party, or on some similar ground. It is important to get a clear view of the position of the estate after the decision of the High Court of 8th August 1910, the effect of which inter alia was to annul the consent decree of the District Court in No. 11 of 1903, and to leave the decree of the Subordinate Judge dated 21st December 1905, which has been already quoted, as final and binding. This decree declaring Katyani's title to the whole estate was clearly a decree in Katyani's favour as representing the whole interests in the estate, and it has rightly been so regarded by both the Courts below in the present case; and it formed res judicata in any question with the Sens. As regards possession of the estate, while the decree made an order for recovery of possession, the possession given under the partition of 1907 continued, the Sens being in possession of the four annas. It seems clear that possession under an agreement which was not binding on the reversionary heirs, could not avail the Sens in a question with a reversionary heir, whose right to possess could not arise until the succession opened to such heir. In that position it appears to their Lordships that unless something thereafter occurred during the life of Katyani which affected the title to the whole or part of the estate, which took such whole or part of the estate away from Katyani and vested it as matter of title in the Sens, mere possession of such whole or part of the estate by the Sens would afford them no answer to the appellant's claim as reversionary heir on Katyani's death, founded on the decree of the Subordinate Judge in No. 11 of 1903, as set up by the decree of the High Court in 1910 in her own Suit No. 59 of 1907.

The respondents maintain that the appellant's claim in the present suit is excluded by reason of the subsequent decision in Suit No. 115 of 1919, instituted by Katyani against the Sens and their mortgagees for recovery of the four annas; that suit was dismissed by the Subordinate Judge and, on appeal, by the High Court. The respondents maintain that Katyani, in that suit, was suing on behalf of the reversioners as well as herself, and that the decision is res judicata against the present appellant. Both Courts below have accepted this contention and have dismissed the appellant's suit and the appellant now challenges their ground of decision, which is largely founded on certain decisions of this Board, which they have held to be applicable, and to which reference will be made later. In the first place, the title to the estate having been finally decided, in any question with the Sens, as above stated, their Lordships are of opinion that the widow, Katyani, had no right to submit it to fresh adjudication by the Courts as against the Sens, so far as the right of the reversionary heirs was concerned, or to affect their right by any such action. In the second place, their Lordships are satisfied, on a scrutiny of the proceedings in Suit No. 115 of 1919, that Katyani was only suing in her own interest, and not as representing the reversionary heirs. In the plaint, dated 15th September 1919, Katyani clearly founded on the decree of the Subordinate Judge in Suit No. 11 of 1903, dated 21st December 1905, as set up by the High Court decree in Suit No. 59 of 1907, dated 8th August 1910, as forming res judicata against the defendants, the Sens, on the

2. Raja Lakshmi Dassee v. Katyayani Dassee, (1911) 38 Cal 639=12 I C 464.

question of title; she then proceeded to deal with her own personal difficulty, viz. the compromise as to which she alleged that it had been obtained from her by the undue influence of her father Kanai, in fraudulent collusion with the Sens. The written statement of the Sens has not been made available. The Subordinate Judge in a judgment dated 24th August 1921 rejected the plaintiff's allegations of fraud and held the compromise to be binding on her so as to prevent recovery of possession by her. This clearly could only relate to Katyani's possession during her life, as the compromise had been finally held not to be binding on the reversionary heirs.

On appeal the High Court, in a judgment dated 21st and 24th July 1925, did not refer to the question of the compromise, but they state, in reference to Suits No. 11 of 1903 and 59 of 1907, that as a result of the compromise decree being held to have been without jurisdiction, the decree of the trial Court in the suit of Katyani (No. 11 of 1903) must be treated as a good decree and that that decree declared her right, but the Court held that Katyani had been out of possession for more than 12 years and could not recover possession and affirmed the dismissal of the suit. Again their Lordships are unable to regard this judgment as affecting the right of the reversionary heir to possession. An examination of the decisions of this Board, on which both the Courts below have relied, will show that the decree against a female holder of the estate which has been held to be binding on a succeeding heir, has in each case involved the decision of the question of title, and not the mere question of possession. In none of the cases had the prior female holder of the estate already obtained a decree of her title to the estate against the defendants. In 9 M I A 539[3] the following passage occurs in the judgment of the Board, delivered by Turner L. J. at p. 603:

> It seems however to be necessary in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the zamindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the zamindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

Anga Mootoo Natchiar, the widow, had claimed in the previous litigation a Hindu widow's estate in the zamindary as self-acquired by her late husband, and maintained that it was not part of the impartible estate. Quite clearly the question of title was in issue, and her failure carried the estate away from the reversionary heirs and the observations of the Board were directed to a litigation as to the title of the estate.

In 20 I A 183[4] the decree against a preceding female heir was founded on limitation, on the ground that she had never been in possession since the death of the widow in 1855, some 26 years before when the succession had opened to her. It was held by this Board that the fact that the decree was founded on limitation did not take the case out of the ruling laid down in 9 M I A 539[3] which is quoted above. Art. 141, Lim. Act of 1877, had first appeared in a more limited form in Art. 142 of the Act of 1871, being then confined to the death of a widow. The judgment of the Board, delivered by Sir Richard Couch, after referring to these changes, states in reference to Art. 141 of the Act of 1877:

> The words 'entitled to the possession of immovable property' refer to the then existing law. Under that law the plaintiff being bound by the decree against Sampurna would not be entitled to bring a suit for possession. The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of Sch. 2 in each of the Acts is only to prescribe the period of limitation for the suit.

Here again it is clear that Sampurna had held no previous decree as to title, and that her title was in issue in the litigation which was instituted on behalf of herself and the reversionary heirs. In 45 I A 168[5]

3. Katama Natchiar v. Rajah of Shivagunga, (1861-63) 9 M I A 539=2 W R 31=1 Suther 520=2 Sar 25 (P C).

4. Harinath Chatterji v. Mothur Mohun Goswami, (1894) 21 Cal 8=20 I A 183=6 Sar 334 (P C).

5. Risal Singh v. Balwant Singh, (1918) 5 A I R P C 87=40 All 593=48 I C 553=45 I A 168 (P C).

a Hindu female, in whom an estate vested on the death of her husband and infant son, had purported to adopt Balwant Singh as son to her husband; subsequently she instituted a suit for a declaration that the adoption was invalid. It was held by this Board that she was estopped by her conduct from denying the validity of the adoption, which was the ground of decision in both the Courts below, and also, that upon the facts the adoption was valid. On the widow's death, the reversionary heir sued for recovery of the estate, alleging that the adoption was invalid. It was held that the reversionary heir was bound by the previous decision against the widow as res judicata. There could be no doubt that the widow in her suit had represented the reversionary heirs, and that the decision that the adoption was valid negatived any right of the reversionary heirs as well as the right of the widow.

In 52 I A 322[6] the widow, Chokkamal, had made an adoption in 1862 to her husband, Arunchala, who had died in 1849. The widow died in 1902, and in 1905 the suit under appeal was instituted by the plaintiffs as reversionary heirs of Arunchala against the defendants, who were successors of the adopted son and were in possession of the estate, and who relied mainly upon the defences that the suit was barred by res judicata and limitation. The former defence was founded on a decree in 1892 in a suit by the mother of the adopted son, against Chokkammal and others, for possession of the estates, which she alleged had been forcibly taken from her by Chokkammal in 1884 — three years before the suit—prior to which date the adopted son, his widow and the plaintiff had held possession since the adoption in 1862. It was held by the High Court, by the decree of 1892, that the adoption was invalid, but that the plaintiff's claim of adverse possession for 12 years was established and they affirmed the decree for possession which the Subordinate Judge had given. The defence of res judicata founded on this decree was sustained by the Board, on the ground that Chokkammal, as defendant, had represented the estate, and the decree of adverse possession bound the reversionary heirs. Again it is clear that the decree excluded the title of both the widow and the reversionary heirs. The Board also based their decision on Art. 129, Limitation Act, 1871, but that part of the decision is not material for present purposes. In the course of the judgment which was delivered by Sir John Edge, the judgment of Macpherson J. in the Full Bench decision in 9 W R 505[7] at p. 510, was quoted with approval and was as follows:

> I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within 12 years from the commencement of the adverse possession.

Lastly in 56 I A 267[8] it is sufficient to quote a passage from the judgment of the Board, delivered by Lord Tomlin, which, after a reference to the case in 20 I A 183,[4] states:

> It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime, the reversionary heir is barred and does not get the benefit of Art. 141. The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for 12 years or more. In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would, in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the Article to ignore the express words of the Article.

Accordingly, the question in the present appeal is whether the decree in the Suit No. 115 of 1919 deprived the appellant of the right to possession. As already stated, their Lordships are of opinion that the appellant's right to possess was established

6. Vaithialinga Mudaliar v. Srirangath Anni, (1925) 12 A I R P C 249=92 I C 85=48 Mad 883=52 I A 322 (P C).

7. Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty, (1868) 9 W R 505 (F B).

8. Jaggo Bai v. Utsava Lal, (1929) 16 A I R P C 166=117 I C 498=51 All 439=56 I A 267 (P C).

as res judicata against the Sens by the decree of the Subordinate Judge in Suit No. 11 of 1903, as set up by the judgment of the High Court in the appellant's Suit No. 59 of 1907, and Katyani's suit for possession No. 115 of 1919 could not, and did not, affect the appellant's right to possession. In their Lordships' judgment therefore the appeal succeeds, and the judgment and decrees of both Courts below should be set aside, and the appellant should have a decree for the amount of the compensation money in suit, and their Lordships will humbly advise His Majesty accordingly. The appellant will have the costs of the appeal and of the proceedings in both Courts below.

K.S./R.K. *Appeal allowed.*

Solicitors for Appellant —
W. W. Box & Co.

Respondents ex parte.

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* * A. I. R. 1938 Privy Council 259

(From Rangoon)

5th July 1938

LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Sooniram Ramniranjandass —
Appellant.

v.

Alagu Nachiyar Koil (Temple) —
Respondents.

Privy Council Appeal No. 71 of 1937.

*** (a) Presidency Towns Insolvency Act (1909), S. 86 and Sch. 2, R. 25 — Position of Official Assignee is that of owner of insolvent's property for benefit of creditors—Claim for property vesting in Official Assignee or for charge over it cannot be dealt with by Official Assignee as tribunal — Evidence should be taken before insolvency Judge.**

The Official Assignee is the person in whom the insolvent's property vests as owner, though only for the benefit of others. Therefore a claim that certain property has not vested in him at all or a claim to have a charge upon property which has vested in him cannot under the Act be dealt with by him as a tribunal. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under R. 25, Sch. 2, it seems more reasonable and more in accordance with a sound interpretation of S. 86 and with English practice under statutory provisions couched in the same terms that the " appeal " from the " act or decision " of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the insolvency Judge himself.

[P 260 C 2]

(b) Evidence — Admissibility — Opinion on effect in law—Transaction towards charities—Opinion held inadmissible.

The opinions of the witnesses as to the effect in law of a customary transaction in business firms of setting aside certain charities and the rights of the beneficiaries of such charities etc., are both inadmissible and useless. [P 261 C 2]

*** * (c) Insolvency—Trust—Firm allocating sums towards charities—Sums kept under control of firm as deposits—Covenant to pay to trustees when required — Trust held not created.**

A business firm during the course of business set aside certain sums towards charities of a temple deity and agreed to keep it with them as deposits under their control and would pay towards charities whenever required to the trustees of the temple deity. When the business firm was adjudicated insolvent it was contended by the trustees of the temple that the deposits held by the firm towards charities made the firm a trustee with the temple trustees as its beneficiaries:

Held that to covenant to pay money to trustees does not make one a trustee; [P 262 C 1]

Held also that, it merely disclosed an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they were trustees because they had consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before, and in computing interest at a rate and in a manner applicable to an ordinary customer.

[P 262 C 1]

A. M. Dunne, R. S. Roxburgh and R. H. Hodge — *for Appellant.*

Sir Herbert Cunliffe and J. M. Parikh — *for Respondents.*

Sir George Rankin. — On 1st April 1933, an order of adjudication under the Presidency Towns Insolvency Act (3 of 1909) (herein called "the Act"), was made by the High Court at Rangoon against a firm therein called the S. A. R. M. Chettyar Firm and described as carrying on business as bankers and moneylenders in Rangoon. This order was made at the instance of the appellants Sooniram Ramniranjandass as petitioning creditors. At the date of the adjudication order the insolvent firm consisted of three brothers, sons of one Ramaswami Chettyar, who had deid some years before. The business was a Hindu joint family business: it had been known at one time as the S. A. Firm and had been carried on by Ramaswami's father and afterwards by Ramaswami as managing member (karta) of the family. On 19th December 1933, the insolvents' schedule of affairs was filed, showing as creditor No. 85 in the list of unsecured

creditors, the name of a Hindu temple situate at a place called O'Siruvayal in the Ramnad district of Madras, the place of origin of this Chetty family. The temple is called Alagiya Nachiar temple. The amount of the debt is stated as Rs. 48,915-10-0; the "date when contracted" is entered as April 1932; and the consideration is described as "deposit". In June of 1934 a proof of debt for the sum mentioned was tendered on behalf of one Annamalai as trustee of the temple, but in July 1937, this was supplemented by another in which Annamalai claimed to prove on behalf of the deity as a worshipper representing the deity and all the worshippers. In this amended proof, interest to the date of adjudication is added to the sum appearing in the insolvents' books making the total debt Rs. 51,488-12-3. The debt is described as

amount due on current account which amount was gifted to the said Alagu-nachiar Koil (temple) by the insolvent firm who retained custody of it as a custodian.

In December 1935, seven affidavits, all in the same form, were filed, by each of which the deponent claimed to be a trustee of the temple and explained that the temple was administered by seven trustees each representing a "karai". They alleged that the insolvent firm was possessed of trust funds belonging to the temple and consented that Annamalai described by them as a close relative of the insolvents should be regarded as a proper person to recover the trust funds for the temple. By S. 52 of the Act, the property of the insolvent divisible amongst his creditors does not comprise property held by the insolvent on trust for any other person. Upon this well-known principle a proceeding was begun on 17th February 1936, in the name of the "85th creditor Alagunachiar Koil" by a statement of claim to recover Rupees 51,488-12-3 in full as trust money. The appellants as "adjudicating creditors" filed objections, whereupon the Official Assignee proceeded to act as a tribunal to decide the matter; and after hearing oral evidence in February 1936, delivered a written judgment or order dated 12th May 1936, holding that

the claimant is entitled to be paid fully and to have a charge on the assets of the insolvents for the sum so due.

Against this, as a judicial order, the appellants purporting to act under S. 86 of the Act, filed a memorandum of appeal and Braund J. as the Judge exercising the insolvency jurisdiction of the Court, dealt with the matter on that footing. On 29th June 1936, he allowed the appeal and declared that the temple had no right to take the sum in question out of the estate of the insolvents or to exclude it from the insolvents' assets in the hands of the Official Assignee. Accordingly he dismissed the application made to the Official Assignee and allowed the appellants certain costs of that application and of the appeal. From this order an appeal was taken to an Appellate Bench of the High Court. The learned Chief Justice and Dunkley J. having differed in opinion (7th December 1936), the appeal was referred to Leach J. as third Judge, who on 21st January 1937, gave judgment agreeing with the Chief Justice in directing that the appeal be allowed and the decision of the Official Assignee restored. From this order the present appeal to His Majesty has been brought.

Whether the claim of the temple be regarded as a mere proof of debt or as a claim to property in the hands of the Official Assignee or to a charge thereon, their Lordships are unable to relate the procedure followed in the High Court to the provisions of the Act. The Official Assignee is the person in whom the insolvent's property vests as owner though only for the benefit of others. How a claim that certain property has not vested in him at all or a claim to have a charge upon property which has vested in him can under the Act be dealt with by him as a tribunal, it is not possible to discover. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under R. 25 of Sch. 2, it seems more reasonable and more in accordance with a sound interpretation of S. 86 and with English practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the Insolvency Judge himself. It is at least clear that the present case cannot be concluded by regarding the Official Assignee as a trial Judge whose estimate of the witnesses' evidence must prima facie be accepted. Inadmissible evidence has come upon the record as though it were good evidence of custom and witnesses have been asked and have answered questions which are questions of law.

The admissible and relevant evidence lies in a very narrow compass. There are, first the books of account kept by the insolvent firm. The books for the years prior to 1928 are not available: they are said to have been burnt. But the ledger for certain years between 1928 and 1933 contains an account in the name of the temple which purports to treat the temple as a depositor who is at credit for a sum which in 1928 had amounted with interest to Rs. 36,670 and which had continued to increase by the addition of compound interest with frequent rests and at varying rests till in 1932 it reached the figure of Rs. 48,915-10-0 above-mentioned. The entries make mention of the interest as at "thavanai" rates—that is, treating the matter as a deposit for a fixed term (apparently two months) at a certain rate of interest appropriate to each term. It is not possible to ascertain the date at which the first credit entry was made or the exact terms thereof or the amount for which the first credit was given but the suggestion made by the respondents was that these entries date probably from the time of Ramaswami's father. There are certain daybook entries to the same effect. The accounts do not show that any drawings had been made by the temple. No books of account kept by or on behalf of the temple have been produced.

In addition to the entries in the insolvents' books there is the oral evidence of a witness Subramoniam Chettyar, given before the Official Assignee. He was one of the claimants, being one of the seven persons who had filed affidavits claiming to be trustees of the temple. He said that each trustee managed the temple's affairs for one year in rotation. He deposed that he came from O'Siruvayal and had known the insolvent's father Ramaswami. He explained that seven "clans" worship this deity: that the eldest member of each clan acts as a trustee; that accounts of receipts and expenditure are kept, but no accounts to show donations to the temple. The main element in his evidence was that a statement had been made to him by the insolvent's father Ramaswami over 20 years before "that there were monies in the name of Alagunachiar in the S. A. R. M. Firm Rangoon";
that he had set apart this sum for the purpose of charity in his firm and that I could send for the expenses of the temple whenever I required.

The witness explained that Ramaswami, who was the eldest brother, the others being minors, managed the affairs of the S. A. family for five or six years and that he had died about 16 or 17 years ago (i. e. from 1936). The witness further said that twice after the conversation described by him, he had gone to Ramaswami and got money for the purposes of the temple. No accounts with reference to these monies were produced and no particulars whatsoever given. This evidence is highly suspicious particularly as it seems reasonably clear that the managers of the idol were in ignorance of the credit in the firm's books. If they had made any claim or obtained any money in recent years, evidence to prove this would have been readily available, and according to Dunkley J. it was common ground that the managers were in entire ignorance of the credit. But, as that learned Judge noticed, the evidence of Subramoniam is as harmless as it is unreliable.

The evinence of a clerk of the insolvents adds little or nothing, but two Chettyar business men were called apparently to explain the practice and intention of Chettyar firms in crediting amounts to charities and temples in their books. The effect of their evidence fairly taken appears to their Lordships to be that it is usual for a firm to credit something towards charity; that if particular sums are credited to a particular deity, that deity is intended to have certain rights as follows: that no money is separately invested or is intended at the time to be withdrawn from use in the firm's business; that interest is credited upon the sum due to the deity at the ordinary rate allowed to customers of the firm, which is lower than the rate obtained by the firm by the use of its money; that the managers of the deity, however, have no right to demand payment when they choose, but the money should be expended for the deity by the firm at the firm's discretion as occasion may arise—in other words the control rests with the firm. This evidence is of importance as an indication of the case made on behalf of the temple; and as a credit in favour of a deity is not self-explanatory, their Lordships do not treat it as inadmissible. Whether it is correct is another matter: for the purpose of the only question now to be decided it may be taken as correct. The opinions of the witnesses as to the effect in law of such a transaction as they describe are however both inadmissible and useless.

Learned counsel for the appellants have not sought to contest the right of the trustees of the temple to rank for dividend

as unsecured creditors in respect of the credits in question, but contest the decision of the Appellate Bench restoring the finding of the Official Assignee that these sums are payable in full out of the insolvents' assets. Their Lordships are not concerned, therefore, to examine any contention to the effect that such entries as were made in the insolvents' books create no legal liability—a question which might well prove to be serious and even difficult. The sole question for determination is whether what is proved to have been done by the insolvent firm was sufficient to make them trustees of any fund for the benefit of the temple or to amount in Hindu law to an endowment for the deity. As by Hindu law an endowment may be effected without writing, without the appointment of a trustee and without vesting the property in anyone other than the deity, learned counsel for the respondents preferred to rest his case upon Hindu law. But it is not open to dispute that the respondents' right to payment in full cannot be made out unless there was either a trust or an endowment.

Their Lordships think it reasonably plain that in the present case there was no endowment of any property and no intention on the part of the insolvent firm to hold any property as trustees for the deity. In this view they are in agreement with Braund and Dunkley JJ. It may be as well to guard against the supposition that because the other party to the transaction was a deity the insolvents must have made themselves trustees. If, instead of Ramaswami's father entering in his books a credit to the temple by way of charity or by way of promise, the firm had owed to the trustees of the temple a like sum by way of rent and had been allowed to postpone payment on terms as to interest, it is clear that the firm would not have been trustees: to covenant to pay money to trustees does not make one a trustee. The prima facie meaning of the entries in the insolvent's books discloses an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they are trustees because they have consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before, and in computing interest at a rate and in a manner applicable to an ordinary customer. If the respondents' witnesses be right, the entries only make the insolvents debtors *sub modo* and on special terms less onerous than their obligations to an ordinary customer—terms which may or may not render their obligations to the temple unenforceable against them. This makes it all the more unreasonable that they should be held to have intended to assume the obligation of trustees. There is no evidence that at any time a particular sum of money was paid to the insolvent firm by themselves on behalf of the temple. The respondents' witnesses speak of Chettyar firms crediting money to a particular deity by way of charity and in any case there could be no purpose in separating moneys in order to mix them again—unless indeed the firm had been minded to create the appearance of a breach of trust.

The same reasons are equally forceful to disprove the suggestion that the entries effect an endowment of property for the deity. The first question to be asked on that suggestion is what property has been made debutter or charged in favour of the idol ? The second is, what proof is there of any such intention ? As an interpretation of the conduct of the insolvent firm the theory of endowment breaks down as completely as does the theory that the firm intended to declare itself trustees for the temple. It is thus unnecessary to consider whether in the circumstances of the case insuperable difficulties beset the respondents' attempt to trace trust moneys in the hands of the insolvents so as to show that they are represented by assets in existence at the date of the insolvency. The respondents fail to show that the insolvents have created a trust fund or have acted as custodians or trustees of any such fund or of any property belonging to the temple. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the order appealed from set aside and the order of Braund J. dated 29th June 1936, restored. The respondents will pay the appellants' costs throughout including the costs of the proceedings before the Official Assignee.

B.D./R.K. *Appeal allowed.*

Solicitors for Appellant —
Lambert & White.

Solicitors for Respondents —
Stanley, Johnson & Allen.

A. I. R. 1938 Privy Council 263

(From Calcutta)

22nd July 1938

LORDS WRIGHT, ROMER AND PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Owners and Parties interested in S. S. "Malacca Maru"—Appellants.

v.

Deutsche Dampfschiffahrts Gesellschaft "Hansa" (owners of S. S. "Marienfels") — Respondents.

Privy Council Appeal No. 6 of 1938, Bengal Appeal No. 25 of 1935.

Shipping — Rules governing navigation in Hughli—R. 5—"Turning points or bends of the river"—Meaning explained.

Although in construing the phrase "turning points or bends of the river" Court has to refer not to the navigable channel but to the river as a whole and in all its breadth, yet such considerations are not necessarily conclusive of the question, and the Court has to consider the matter with reference to the channel and from the practical standpoint of a navigator. The prohibition cannot be supposed to extend to all parts of the river where the channel is not completely striaght, but must be interpreted with regard not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled. [P 265 C 1]

R. F. Hayward and Willmer — *for Appellants.*

L. P. E. Pugh, Sir T. Strangman and C. Bagram — *for Respondents.*

Sir George Rankin.—At 12.35 P. M. on Sunday 16th March 1930, the steamships 'Marienfels' and 'Malacca Maru' were in collision in the river Hughli at a spot south of Pukuria Point Column and north of lower Brul Sand buoy. The 'Marienfels' is a vessel belonging to the plaintiffs-respondents, a German company : her gross tonnage is 8000 tons, her length 495 feet and her beam 58 feet. The 'Malacca Maru' is a Japanese vessel of 5374 tons, length 400 feet and beam 54½ feet. The collision occurred in broad daylight : the weather was fine and clear : the wind of no material force. It was flood tide—a spring tide of 3½ knots in the navigable channel. The water had risen 17 feet above low water marks and it was still rising. Both vessels were proceeding southwards to sea and the 'Marienfels' was overtaking. They had left Garden Reach — the 'Malacca Maru' at 9.25 A. M. and the 'Marienfels' some twenty minutes later. The speed of the former was about ten knots and of the latter about 11½. Both vessels were part laden and both were drawing some 20 or 21 feet. Both were in charge of duly licensed pilots, Pilot King navigating the 'Marienfels', Pilot Halford the 'Malacca Maru'. At the time of the collision the bluff of the port bow — 14 feet from the stem — of the 'Malacca Maru' struck the starboard side of the 'Marienfels' a little abaft amidships. The damage sustained by the 'Marienfels' was not such as to prevent her from continuing her voyage to Madras, where her master made a protest on 24th March. The 'Malacca Maru' was more severely damaged and put back to Calcutta, where a protest was made on 25th March. Both pilots made reports to the port authority at Calcutta on the day of the collision.

On 12th March 1932, the respondent company brought in the admiralty jurisdiction of the High Court at Calcutta the suit out of which this appeal arises. The plaint claimed Rs. 64,870 as damages caused by the negligent navigation of the 'Malacca Maru'. The appellants, by written statement filed 25th April 1932, denied negligence and asserted that the collision was caused or contributed to by the negligent navigation of the 'Marienfels'; but as the period of two years limited by the Maritime Conventions Act, 1911, had been allowed to elapse they were unable to maintain a cross claim for damages. At the trial in December 1934, Cunliffe J. heard the evidence of Pilot King but Pilot Halford had died in 1931 and his report of 16th March 1930, was the only available means of ascertaining his version of the occurrence. Each side called the master and other witnesses from its vessel. The plaintiff company in addition called two pilots from the Bengal Pilot Service—Pilot Davies and Pilot Garnet; while the defendants called a river surveyor Mr. Oag and Captain Ducat-Amos, Master of the British India Mail Steamer 'Karapara,' plying from Calcutta to Rangoon and the Straits Settlements. Cunliffe J. (17th December 1934) held that both vessels were to blame for the collision and apportioned the blame three-fourths to the 'Malacca Maru' and one-fourth to the 'Marienfels'. On appeal a Division Bench (Derbyshire C. J. and Costello J.) varied this finding and held the 'Malacca Maru' alone to blame. From their decree dated 11th February 1936, the defendants have appealed to His Majesty by special leave.

By Art. 24 of the General Regulations for Preventing Collisions at Sea every

vessel overtaking any other is required to keep out of the way of the other and remains under a duty to keep clear of the other until she herself is finally past and clear. Art. 25, which applies to the part of the Hughli now in question, requires steam vessels to keep to the starboard side of the fairway or mid-channel. The local rules governing navigation in the Hughli which were in force at the time contain provisions which modify Art. 24. Rr. 5 and 7 are as follows :

5. No steam vessel shall attempt to strive or race the one against the other. When steam vessels are proceeding in the same direction, but with unequal speed, the vessel which is steaming slowest shall in the narrow reaches of the river offer no obstruction whatever by crossing the channel or otherwise to the free passage of the faster vessel and shall ease and, if necessary, stop the engines, as soon as the faster vessel comes abreast in order to allow her to freely pass. The Pilot of the faster vessel, if intending to pass, shall intimate such approach by a prolonged blast from his steam-whistle. But no vessel will be justified in passing such vessel at any of the turning points or bends of the river, nor in a part of the channel so narrow that a third vessel could not with safety pass them.

7. A ball at the foremast head to be shown by every inward and outward-bound vessel. When going full speed the ball to be kept at the truck, but lowered about two fathoms when going slow.

It is common ground now that Pilot King at 12-20 P. M., while well astern of the "Malacca Maru" gave a long blast as a signal that he intended to pass her. The parties are not in agreement as to the exact position of the ships when the blast was given; the plaintiffs' case being that they were near the Fairway Outer Column while the defendants say that they were further south. So, too, while there is agreement that the time of collision was 12-35 P. M., the exact place of impact is disputed; the plaintiffs' witnesses say that it was very little north of the Lower Brul Sand buoy at a spot marked with the sounding 21 on Plan No. 186 (Ex. A), while the defendants put the place of collision further north and west near a spot marked 39, very little south of Pukuria Point Column. The distance from the Fairway Outer Column to the Lower Brul Sand buoy is about $2\frac{1}{4}$ miles. Both Courts in India have accepted the evidence of Pilot King and believed the plaintiffs' story of what happened. Their Lordships see no reason to depart from their rule not to disturb concurrent findings of the fact and the main features of the case may be outlined as follows. Having given the long blast when near the Fairway marks, where the navigable channel had a width of about 1000 feet, the "Marienfels", which was about two ships' length astern, began to overhaul the "Malacca Maru" so as to pass to the east of her, and the two ships were abreast between the Upper Brul Sand buoy on the eastern and Bight Column on the western bank. Between that place and Poadpara Beacon the "Marienfels" had gained about half a length. Thereafter the "Malacca Maru" began to gain on the "Marienfels" owing to the tide being less strong by some two knots on the western than on the eastern side of this part of the Brul Sands Reach. At a place which is marked on the western bank by a creek both vessels were still maintaining their respective speeds of $11\frac{1}{2}$ and 10 knots above-mentioned and the "Malacca Maru" had not quite come abreast of the "Marienfels", when the "Marienfels", which had been about 400 feet away from the "Malacca Maru" while overtaking her, opened out to port and gradually increased the lateral distance to 600 feet. At Pukuria Point Column, a little further south, an eddy is formed on the flood tide which crosses the river in a north-easterly direction and cushions off the eastern bank in a north-westerly direction but with diminished force. The vessels were abeam at this point when the "Malacca Maru" meeting the eddy took a heavy run or sheer to port which carried her up against the "Marienfels" notwithstanding that the "Marienfels" went to port in an attempt to avoid the collision.

In the plaint the "Malacca Maru" among other heads of negligence had been charged with negligence in not porting her helm (old style) or easing or reversing her engines after the commencement of the sheer. The Japanese helmsman had deposed that he received the order hard-a-port almost immediately before the collision took place. Cunliffe J. found the "Malacca Maru" to be in fault for taking helm action too late, and the learned Chief Justice considered that her helm was not put hard-a-port as soon as it ought to have been. Both Courts were also of opinion that the "Malacca Maru" was in fault in not easing her engines when the "Marienfels" first came abreast of her near Bight Column. Cunliffe J. however held the "Marienfels" to have been in fault in not abandoning the attempt to pass the "Malacca Maru" when she saw that the latter was taking no notice of the signal and was standing on without reducing speed. As R. 5 of the

local rules does not require the overtaken vessel to reduce speed before the vessels are abreast, the Chief Justice took a different view, holding that the "Marienfels" having come abreast at Upper Brul Sand buoy, her pilot could not until some time had elapsed be expected to decide that the "Malacca Maru" had determined to disobey the rule as to lessening speed; and that in the meanwhile the "Marienfels" had gained half a length. In these circumstances he considered that to have slackened speed and come again abeam of the "Malacca Maru" was more dangerous and less advisable than the action which Pilot King in fact took—viz. to maintain her speed but open out to a lateral distance of 600 feet. Cunliffe J. inferred from the behaviour of the "Malacca Maru" that she kept a bad lookout, but this criticism does not appear to have been repeated by the Appellate Court and their Lordships do not think it established as an independent ground for imputing blame to that vessel.

The first question for determination is whether the part of the river in which the "Marienfels" proceeded to pass the "Malacca Maru" was one of the "turning points or bends of the river" within the meaning of R. 5 of the local rules. It was contended for the plaintiff company that the phrase must be construed to refer not to the navigable channel but to the river as a whole and in all its breadth and that below the Fairway marks the Hughli's eastern bank is practically straight, though there is a bulge or bight enlarging the river on the western side. Their Lordships are not prepared to hold that such considerations are necessarily conclusive of the question and have considered the matter with reference to the channel and from the practical standpoint of a navigator. The prohibition cannot be supposed to extend to all parts of the river where the channel is not completely straight, but must be interpreted with regard not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled. Their Lordships have the advantage of the opinion of the Elder Brethren upon the matter and are in agreement with them and with the Courts in India in holding that the course of the river from above the Fairway marks to Fisherman's point is not a turning point or bend. They accept the evidence of Pilot King to the effect that Brul Reach was a recognized passing place until the local rules were changed, as a result of the collision in this case, so as to prohibit passing below Bight Column.

On this view the action of the "Malacca Maru" in failing to slacken speed when the "Marienfels" came abreast of her at Bight Column cannot be seriously defended and was a plain breach of duty under R. 5. Indeed their Lordships consider it to be a misinterpretation of her action to suppose that her pilot had any objection to being overtaken at that point. The state of the water afforded ample width of channel: he made no protest at the time or in his report of the same date that he was wrongly overtaken. He may or may not have appreciated that under the rule the duty to ease engines was unconditional, unlike the duty to stop the engines which arose only if such action became necessary. But, in any case, he was content to be passed while going against the tide at his full speed through the water and took no action whatever to alter this position, thus incurring unnecessary risk in disobedience to the rule. The circumstance that the superiority of the "Marienfels" in speed was not very great made it all the more his duty to slow down to let her pass and the fact that his own course would take him into the slacker water on the western side made it still more imprudent to maintain full speed.

The result was that there soon came a time at which the "Malacca Maru" was approaching the eddy with the "Marienfels" more or less abreast of her. This was the position opposite the creek on the western bank, and their Lordships accept the appellants' view that by this time it had become inadvisable for the "Malacca Maru" to slacken speed. They agree however with the learned Chief Justice in rejecting the contention that the "Marienfels" should have slackened speed. Before attributing blame to her in dealing with an emergency which the fault of the other vessel had produced, and for merely passing where she was entitled to expect to be allowed freely to pass, it is necessary to consider her exact position at the time when the emergency became apparent. Pilot King had opened out towards the eastern bank, increasing his lateral distance to 600 feet. He might expect to encounter some force from the eddy both in its secondary and primary stage, though not to the same degree as the "Malacca Maru" on the

western side so far as regards the primary eddy. Had he eased engines, the period during which the two ships were overlapping more or less must have been considerable even if the other pilot had not done likewise at the same time. But in any case it is in their Lordships' view unreasonable to expect him to have anticipated that the "Malacca Maru", though maintaining her own speed and keeping close to the western bank, would meet the eddy so as to sheer right across the channel. It is not possible to account for behaviour so erratic by supposing it to be an ordinary consequence of the flood tide at this point, and even if it was not necessarily negligent to enter the eddy with helm amid ships and without trying in advance to swing the vessel's head against the eddy, their Lordships consider that the Courts in India had solid reason for regarding it as proved that the helm action of the "Malacca Maru" was late and negligently late. Their Lordships are advised by the assessors and agree that after the "Marienfels" had gone to a distance of 600 feet she had no reason to suppose that the "Malacca Maru" would be put in any difficulty ; that the pilot of the "Malacca Maru" could be expected, more particularly with a vessel to port of him, to keep his proper water and have reasonable control of his vessel, anticipating by helm action any likely falling off of his vessel's head by reason of the eddy. In these circumstances it would be unwarrantable to hold Pilot King to blame for striving or racing, or for not slackening speed at the time when he realized that the "Malacca Maru" meant to stand on without easing engines.

The able argument of Mr. Hayward for the appellants laid much stress on the fact that the ball at the truck of the "Malacca Maru" was never lowered. But Pilot King would not be certain of her intention to continue at full speed until some time after he had come abreast of her, whether he waited to see if the ball would be lowered or whether he watched the relative position of the vessels. He could not in either case be expected to act at once on the view that the other vessel was not merely slow to respond but was minded to break the rule. The High Court on appeal have rightly held the "Malacca Maru" alone to blame.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondent company.

B.D./R.K. *Appeal dismissed.*

Solicitors for Appellants — Waltons & Co.

Solicitors for Respondents — Morgan Price and Marley & Rugg.

*** A. I. R. 1938 Privy Council 266**

(From Lahore)

21st July 1938

LORDS WRIGHT, ROMER AND PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Bawa Faqir Singh — Appellant.

v.

Emperor.

Privy Council Appeal No. 38 of 1938.

*** Criminal P. C. (1898), Ss. 337 and 494— Manner in which tender of pardon is made following in substance method prescribed by S. 337—S. 337 (2-A) applies — Minor irregularities cannot be taken to affect operation of S. 337—Intention of Local Government not to act under S. 337 does not matter.**

Where the offences charged were within S. 337 and the tender of pardon was made by a Magistrate within the terms of the Section on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge, and the persons who accepted the tenders of pardon from the Magistrates were severally examined before the Magistrate taking cognizance of the offence, S. 337 applies and the requirements of sub-s. 2-A then automatically come into force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence, is to be committed to the Court of Session or High Court. The fact that the Magistrate has not recorded his reasons as required by sub-s. 1-A is merely an irregularity on the part of the Magistrate, and the right of the accused or the approver cannot be affected because the Magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material that the Magistrate in tendering the pardon did so after consulting the Local Government and with its authority. That is an internal matter of administration which cannot affect the position of the accused or the approver. The proceedings so taken under S. 337 are different in character from the course which would be taken under S. 494. The former Section deals with the action of a judicial, the latter with that of an executive officer. S. 494 says nothing about pardons at all. If the overt acts of the Local Government are such as to be only capable of being referred to S. 337, their intention not to act under it cannot matter. Hence when a Magistrate has tendered the pardon the trial must not be by another Magistrate even though he is vested under S. 30 of the Code to try such an offence but by the High Court or Sessions Court. [P 269 C 1, 2 ; P 270 C 1]

J. M. Pringle — *for Appellant.*

G. D. Roberts, W. Wallach and J. Megam — *for the Crown.*

Lord Wright.—The appellant was convicted and sentenced on 28th May 1936, by the Special Magistrate of the District of Lahore under S. 120.B (conspiracy) and S. 471 (using as genuine a forged document known to be forged) of the Indian Penal Code. The sentence was a sentence of rigorous imprisonment for five years. The conviction and sentence were confirmed on appeal. The ground of this appeal is that the Special Magistrate had no jurisdiction to try the case, since it came within the provision of S. 337, Criminal P. C., and could only be lawfully tried in the circumstances of the case by the High Court or Court of Session. This objection was overruled by a decision of the High Court of Lahore and in effect it is from that decision that this appeal is brought. The facts which are so far as relevant not in dispute may be shortly stated. The appellant, an advocate of the High Court, acted as counsel for G. S. Kochar, who was plaintiff in a suit in the Court of the Senior Subordinate Judge based on a promissory note. The plaintiff succeeded against two of the defendants, both before the Subordinate Judge and on appeal. Meantime complaints had been made by Durga Das, the defendant, against whom the case was dismissed, that his signature to the promissory note had been forged. On 14th May 1928, the District Magistrate, acting on a police report, directed the issue of warrants against six persons, including the appellant and two other persons Sain Dass and Vishwa Mitter. On 3rd June 1928, the District Magistrate had brought before him Sain Dass, who was then in custody and read over to him a document which had been enclosed with a letter sent to him by the Local Government. The letter, which was in answer to a communication from the District Magistrate on the question of obtaining evidence from one or more of the accused persons, was in the following terms:

Subject :—Grant of a promise of pardon to Sain Dass son of L. Nagar Mal.

Sir,

In reply to your unofficial note No. 751, dated 19th May 1928, I am directed by the Governor in Council to state that Sain Dass may be offered a promise of pardon in the terms of the enclosed draft.

The said enclosed draft ran as follows :

'PROMISE.'

1. B. Shamsher Singh son of Bir Singh.
2. Ram Lal son of Kesho Ram, Clerk, Post Master General's Office.
3. Ganda Singh Kochar son of M. S. Kochar.
4. Wishwa Mitter son of Dina Nath, Clerk, Ferozepore Arsenal.

Whereas Sain Das son of L. Nagar Mal, caste Khatri, Manager, Central Co-operative Bank, Karnal, has undertaken to make a full and true disclosure of the whole of the facts within his knowledge regarding the criminal activities of B. Faqir Singh son of B. Bir Singh, Balla, Advocate, High Court Lahore and other persons mentioned in the margin and whereas His Excellency the Governor in Council is pleased to direct that on condition of the said Sain Dass making such a full and true disclosure, no proceedings shall be taken against him with respect to the said offences, the Deputy Commissioner of Lahore is hereby authorised to inform the said Sain Dass that no proceedings will be taken against him if he makes a full and true disclosure of the whole of the circumstances of the cases in question within his knowledge and repeats the same when called upon to do so in any Court of justice.

By order of the Governor in Council.

(Sd.) H. M. COWAN,
Home Secretary to Government,
Punjab.

Simla.
Dated the 29th May 1928.

Sain Dass, when the draft was read over to him, accepted the terms. The District Magistrate then recorded the following order :

Sain Dass present. Conditions explained to him and accepted by him. Public Prosecutor is authorised to withdraw the case against him.

(Sd.) S. H. PUCKLE,
District Magistrate, 3-6-28.

Mr. Puckle held the offices both of District Magistrate and Deputy Commissioner. The proceedings in the case were very delayed and protracted. Eventually, after various protests and objections by the appellant, the Public Prosecutor applied to Mr. Luthra, the Special Magistrate, to whom the case had been transferred and who was vested with the powers under S. 30 of the Code, for permission to withdraw from the prosecution of Sain Dass. The Special Magistrate by order dated 4th July 1932, allowed the Public Prosecutor to withdraw the case under S. 494, Criminal P. C. The appellant objected to this order on various grounds, in particular that the case could only properly proceed under S. 337, whereas the prosecution were seeking to have the case tried otherwise than before the Sessions Judge as S. 337 would require. Sain Dass

was thereupon called on 9th March 1933, as a witness for the prosecution before the Magistrate, Mr. Luthra. On 7th April 1933, another of the accused, Vishwa Mitter, was called before an Additional District Magistrate at Lahore, and a conditional promise of pardon was read over to him by the Magistrate, the same procedure being followed as in the case of Sain Dass. Vishwa Mitter accepted the offer. An application was then made to the Special Magistrate, Mr. Luthra, for leave to withdraw the case against Vishwa Mitter under S. 494 of the Code. Objection was made by the appellant on much the same grounds as in the case of Sain Dass, but the Magistrate made the order and in due course Vishwa Mitter gave evidence before the Magistrate.

On 26th May 1936, Mr. Luthra, having completed the prolonged proceedings, gave judgment acquitting two of the accused, but finding the appellant and one other of the accused guilty under Ss. 120-B, 467 and 471, Penal Code, and imposing on the appellant and the other accused who was found guilty, a sentence of rigorous imprisonment for five years. This sentence was confirmed on appeal with a variation in respect of the conviction. During the proceedings it was clear that the Special Magistrate did not intend to commit the accused to the Sessions Court as required by S. 337. Not only did he sanction the discharge of Sain Dass and Vishwa Mitter under S. 494, but he framed charges against the appellant before the examination of the witnesses was completed, under S. 254, instead of proceeding under Ss. 206-210, which apply to committal for trial. The appellant objected to this course, claiming that he was entitled to be committed for trial under S. 337, but his objections were overruled eventually by a Divisional Bench of the High Court consisting of Bhide and Coldstream JJ., who on 29th October 1934, delivered judgment, rejecting the objection with the result that the trial continued and was concluded before the Magistrate as already stated.

The question is whether S. 337 and the material Sections which follow have been brought into operation by what was done by the Magistrates when they offered a tender of pardon to the two approvers, and by what happened subsequently. It will be convenient to summarize briefly the relevant Sections of the Code. S. 337 is limited to certain offences, including those triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years. These latter words cover the offences with which the appellant was charged. The Section empowers certain Magistrates, at any stage of the investigation or inquiry into or the trial of the offence, with a view to obtaining the evidence of any person concerned in or privy to the offence, to tender to him a pardon on condition of his making a full and true disclosure of what he knows relative to the offence. A Magistrate who tenders a pardon under the Section is to record his reasons for so doing, and furnish a copy to the accused if required. Every person accepting a tender under the Section is to be examined in the Court of the Magistrate and in the subsequent trial if any. Sub-section 2-A is the Section vital to this case. It provides that :

> (2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-s. (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

Section 338 gives power to the Court to which commitment is made to tender or order the Magistrate to tender a pardon on the similar condition. S. 339 deals with the trial of a person to whom a conditional pardon has been granted under Ss. 337 and 338, if the Public Prosecutor certifies that he has not fulfilled the condition of full and complete disclosure. S. 339-A provides that a person by whom a tender of pardon has been accepted, when tried under S. 339, is to be asked whether he pleads that he has complied with the conditions of the pardon, and if it is found that he has, he shall be acquitted. Before considering the rival contentions in this appeal, it will be necessary to refer to S. 494, which it is said on behalf of the respondent is the Section used in the proceedings. That Section enables the Public Prosecutor with the consent of the Court to withdraw from the prosecution before the jury return a verdict or where there is no jury, before judgment is pronounced, whereupon the accused shall be discharged if the withdrawal is made before a charge has been framed, or if it is made after a charge has been framed or no charge is required, he shall be acquitted. The respondent claims that it was under S. 494 that the charge was withdrawn by the Public Prosecutor, that this was done with the consent of the Court, and accord-

ingly that the accused has no right to claim that he is entitled under S. 337 to trial by the High Court or a Sessions Court, while the approver cannot claim the benefit of the procedure for his trial provided by Ss. 339 and 339-A. Under Cl. (a) of S. 494 the approver is merely discharged, which means that he may again be put on trial for the same offence.

It is clear that in the case of each of the two approvers, Sain Dass and Vishwa Mitter, the application to withdraw was made and the consent of the Court was given as under S. 494. But the issue to be determined here is whether the action previously taken in tendering a conditional pardon and on its being accepted, examining the approvers did not constitute action only consistent with being taken under S. 337 and therefore debarring the prosecution from claiming that they were entitled thereafter to ignore the provisions of S. 337 and proceed under S. 494. Their Lordships are of opinion that the prosecution were not so entitled, and therefore it is not necessary here to discuss the precise effect of S. 494 or to consider any question which might arise in regard to S. 343, which by its express terms does not apply to S. 337, if action were not taken under that Section. In their Lordships' judgment, what was done here comes substantially within Sec. 337. The offences charged were within the Section. The tender of pardon was made by a Magistrate, within the terms of the Section. It was expressly made on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge. It is next to be observed that the persons who accepted the tenders of pardon from the Magistrates, were severally examined before the Magistrate taking cognizance of the offence. The requirements of sub-s. 2-A then automatically came into force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence is to be committed to the Court of Session or High Court. It is said that the Magistrate has not recorded his reasons as required by sub-s. 1-A. But that is merely an irregularity on the part of the Magistrate. The right of the accused or the approver cannot be affected because the Magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material in their Lordships' judgment that the Magistrate in tendering the pardon did so after consulting the Local Government and with its authority. That is an internal matter of administration, which cannot affect the position of the accused or the approver. The essential fact is that the pardon was tendered to the approver by the Magistrate. It is obvious that the proceedings so taken under S. 337 were different in character from the course which would have been taken under S. 494. This latter Section belongs to a different chapter of the Code. S. 337 falls under Chap. 24, which deals with general provisions as to inquiries and trials. S. 494 falls under Chap. 38, which is headed "of the Public Prosecutor," that is to say, the former Section deals with the action of a judicial, the latter with that of an executive officer. S. 494 says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under S. 494 differ from those under Sec. 337. No doubt, at a later stage in the present proceedings, the prosecution sought to bring themselves under S. 494, by purporting to take action under it, but it was then, in their Lordships' judgment, too late to change the position either as against the appellant or as against either of the approvers.

It is said that the Local Government did not intend to act under S. 337, but if their overt acts are such as to be only capable of being referred to that Section, their intention not to act under it cannot matter. It is not necessary to consider whether the prosecution had a desire to reap the benefits of S. 337, while also desiring to evade the consequence of having to try the case before the High Court or Court of Session, because in their Lordships' judgment it is impossible thus to make the best of both worlds. If the manner in which the tender of pardon is made, follows in substance the method prescribed in S. 337, then the Section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the Section. Their Lordships do not seek in deciding as they do to throw any doubt on the general prerogative right to pardon. They are dealing here

with the special statutory machinery provided under S. 337, with its peculiar feature that the pardon under that Section is tendered as a judicial act and under the special precautions, rules and consequences which the statute sets out. One consequence, perhaps the most important, is that when a Magistrate has tendered the pardon, the trial must not be by another Magistrate even though he is vested under S. 30 of the Code, to try such an offence, but by the High Court or Sessions Court.

For these reasons their Lordships are of opinion that the trial was without jurisdiction and hence that the appeal should be allowed and the conviction and sentence set aside. In their opinion the case should be remitted to the Magistrate with direction to him to take the appropriate action under S. 337 (2-A). They will humbly so advise His Majesty.

D.S./R.K. *Appeal allowed.*

Solicitors for Appellant —
T. L. Wilson & Co.

Solicitors for the Crown —
Solicitor, India Office.

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* A. I. R. 1938 Privy Council 270

(From Ontario)

24th June 1938

LORD THANKERTON, LORD ROMER AND SIR LANCELOT SANDERSON.

Elizabeth Arminella Burrows Sifton —
Appellant.

v.

Clifford Sifton and others —
Respondents.

Privy Council Appeal No. 20 of 1938.

*** (a) Will—Construction — Income devised on daughter—Clause stopping payment in case daughter does not reside in Canada — Clause held was condition subsequent and void for uncertainty.**

In a will after stating that the daughter of the devisee should get the income of the property, the will had another clause embodied in it to this effect: "The payment to my said daughter shall be made only so long as she shall continue to reside in Canada." The dispute was with regard to the construction of this clause. Whether residence in Canada meant perpetual residence or if temporary absence was to be condoned and if so for what period or periods and for what reasons :

Held that the clause was a condition subsequent and was void for uncertainty : *(1859) 7 H L C 707; (1912) 2 Ch 471; (1883) 23 Ch D 158 and (1927) 2 Ch 264, Ref.* [P 275 C 2]

*** (b) Will—Construction—Condition subsequent or precedent doubtful — Presumption is in favour of condition subsequent.**

Where it is doubtful whether a condition be precedent or subsequent the Court prima facie treats it is being subsequent. For there is a presumption in favour of early vesting. [P 276 C 1]

Cyril Radcliffe and Grant Gordon — *for Appellant.*

Charles Russell and G. P. Seade — *for Respondents.*

Lord Romer. — This is an appeal from a judgment of the Court of Appeal for the Province of Ontario which varied a judgment of Middleton J. given upon an application by way of originating motion brought by the respondents, Clifford Sifton and Wilfred Victor Sifton, the surviving trustees of the will of Clifford Winfield Burrows Sifton, deceased. By the motion the trustees sought the opinion, advice and direction of the Court on certain questions arising in the administration of that testator's estate. The testator died on 13th June 1928, leaving him surviving his widow, the respondent Mabel Cable Sifton, and his daughter and only child, the appellant, who was then of the age of 13 years. The will (dated 12th July 1926), after bequeathing the testator's furniture and effects to the appellant, continued as follows :

I give, devise and bequeath all other property real and personal to my executors upon the following trusts namely—

To manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is 40 years of age after which the whole income of the estate shall be paid to her annually.

But the will then proceeded as follows :

The payments to my said daughter shall be made only so long as she shall continue to reside in Canada.

The principal question arising upon this appeal is whether this last-mentioned direction is not void for uncertainty. No light is thrown upon this question by the remainder of the will which merely provided that if the appellant should die leaving issue, her children should receive the whole estate in equal shares on attainment respectively by each child of the age of 25 years, but that if the appellant should die leaving no issue the corpus of the estate should be divided equally between the then living grandchildren of the testator's father Sir Clifford Sifton by the testator's mother the late Lady Elizabeth Sifton. The will contained no express direction as to what was to happen to the income of the estate during the rest of the appellant's life after

she should have ceased to "reside in Canada."

The testator is stated in the evidence to have been "domiciled" in England during the years 1915 to 1925 but to have returned to Canada in the last-mentioned year with his daughter, and to have taken up his residence (presumably with her) at Assiniboine Lodge in the County of Leeds, Ontario, where he continued to reside except for temporary absences on business or pleasure until his death in 1928. After the death of her father, the appellant appears to have remained in Canada continuously until the month of October 1934, during the latter part of which period she was taking a course in modern languages at the University of Toronto. This course provided an option to take the third year thereof by travelling abroad and the appellant accordingly spent the period between October 1934, and September 1935, in European countries, travelling and studying for the purpose of completing her education. Thereafter she returned to Canada where she has remained down to the present time. Since the month of June 1936, she has maintained an apartment of her own in the City of Montreal which she has taken on lease and fully furnished. In the month of February 1937, however, she was desirous of going abroad again for the purpose of study and travel, but very naturally was anxious to know to what extent she could gratify that desire without any risk of it being held that she did not "continue to reside in Canada" within the meaning of the will. It was in these circumstances that the respondent trustees issued their originating motion for the determination by the Court of certain specific questions. The first five of these questions illustrate so well the difficulties that arise in trying to ascertain the meaning of the words "continue to reside in Canada" that it is worth while setting them out in full. They were as follows :

(a) In the event of Elizabeth Arminella Burrows Sifton maintaining a residence in Canada but temporarily going abroad (out of Canada) for the purpose of travelling and/or studying for a period not exceeding 11 months and returning to Canada thereafter, would the said Elizabeth Arminella Burrows Sifton during her temporary absence from Canada 'continue to reside in Canada' within the meaning of the words 'continue to reside in Canada' as used in said will ?

(b) If the answer to question (a) be in the affirmative, could Elizabeth Arminella Burrows Sifton after a lapse of not less than one month again go abroad under similar circumstances and similarly 'continue to reside in Canada' ?

(c) In the event that Elizabeth Arminella Burrows Sifton so temporarily goes abroad for a period of 11 months should constitute a failure on her part to so 'continue to reside in Canada' may Elizabeth Arminella Burrows Sifton absent herself from Canada for any period under any circumstances and still so 'continue to reside in Canada' and, if so, for what periods and under what circumstances may she so absent herself ?

(d) Is the purpose for which Elizabeth Arminella Burrows Sifton absents herself from Canada material to the question of whether or not she so 'continues to reside in Canada' ?

(e) If the answer to question (d) be in the affirmative

I. Is any temporary purpose sufficient ?

II. If the answer to (e) I. be in the negative, what purposes would be sufficient ?

III. If intention be material, would the written statement of Elizabeth Arminella Burrows Sifton of her intention delivered to the executors of said estate sufficiently evidence said intention ?

The motion in due course came on for hearing before Middleton J., the appellant being the only respondent to the motion. The only question argued before him was as to the meaning of the words "continue to reside in Canada." The point that such words were void for uncertainty was not raised on that occasion. On 18th February 1937, the learned Judge delivered judgment. In the course of it, after referring to the contention at that time being advanced by the appellant that the will only required her to maintain a residence in Canada and that so long as she maintained such a residence she was at liberty to spend as much of her time outside Canada as she thought fit, he continued as follows :

After very careful consideration I am of opinion that the testator contemplated a far more restricted meaning to this clause of his will than the daughter apparently thinks. I agree with her that a merely temporary absence from Canada for the purpose of education or travel will not bring about a forfeiture. The absence during 1934 and 1935 was for such a temporary purpose and I think worked no forfeiture, but it is impossible to say that an absence during each of the following years for 11 months in the year will not bring a forfeiture. That would, I think, work a forfeiture unless the executors are satisfied that any particular trip or extended period of residence abroad is in good faith for the purpose of completing her education. It is impossible for the Court to define with any accuracy what future conduct will fall within the terms of the will.

Later he added these words :

The questions as propounded in the notice of motion do not admit of categorical answers.

In the judgment as drawn up however an attempt was made to give the executors somewhat more specific directions. It was, so far as material, in these terms :

1. This Court doth declare that the true intent, meaning and construction of the clause, 'The payments to my said daughter shall be made only so

long as she shall continue to reside in Canada' used in the said last will and testament is :

(a) That the words 'to reside in Canada' are equivalent to 'spend substantially all of her time in Canada' but that mere temporary absences from Canada in certain circumstances would not bring about a forfeiture of the interest of the said daughter in the estate.

(b) That any and all absences of the said daughter from Canada not exceeding two calendar months in the aggregate on one or more occasions during any one calendar year, or not exceeding two calendar months on one continuous occasion and one additional calendar month on one or more additional occasions in one calendar year, be in all events incapable of constituting a failure to continue to reside in Canada. . . .

(c) That the absence of the said daughter from Canada abroad between October 1934, and September 1935, does not work a forfeiture of such interest.

(d) That an absence from Canada for a period of 11 months during the next two or three years will work a forfeiture of such interest unless the executors . . . . are satisfied it is in good faith for the purpose of completing the education of the said daughter.

* * * *

2. And this Court doth further order and adjudge that the questions propounded in the notice of motion do not now admit of categorical answers but the parties may apply to this Court from time to time as circumstances arise, for the advice, opinion, and direction of the Court on the matters in question.

Their Lordships realize to the full the difficulty of construing the words in question. But with all respect to Middleton J. they cannot feel that his solution of the difficulty is a satisfactory one. It merely introduces further difficulties of construction. What, for instance, is the meaning to be attributed to the words "substantially," "temporary" and "certain circumstances" in sub-para. (a) of the declaration ? Sub-para. (b) was no doubt added for the purpose of indicating what the learned Judge meant to indicate by the word 'temporary,' and that sub-paragraph and those lettered (c) and (d) may be regarded as intended to throw some light upon the expression "certain circumstances." But the indication contained in sub-para. (b) that absences from Canada for three calendar months in the aggregate on one or more occasions during any one calendar year are not or may not be permissible when no one absence is a continuous one for two calendar months, yet are permissible if one of such absences is a continuous one for two calendar months, only adds to the difficulty of construing the word "temporary." Sub-para. (b) moreover covers absences for the periods therein mentioned under all circumstances and for any purpose, whereas sub-paras. (c) and (d) are dealing with absences for the purpose of completing the appellant's education. But when (if ever) a person's education can be said to be completed is not an easy matter to determine. It is further to be observed that the judgment as drawn up in no way refers to any obligation upon the appellant to maintain a residence in Canada, though in giving his decision the learned Judge had said :

The word 'residence' is an elastic word ; it takes colour from the context in which it is used. Here it means an actual permanent residence, a home. It will not cease to be a residence by reason of mere temporary absence.

Whether or not he considered the maintenance of a house or other place of residence to be obligatory is therefore left in some doubt. But the learned Judge had plainly stated that it was impossible to define with any accuracy what future conduct would fall within the terms of the will, and although the judgment was a meritorious attempt to assist the parties, it abundantly confirmed the truth of that statement. On 5th March 1937, the appellant issued a notice of appeal from the judgment of Middleton J. to the Supreme Court of Ontario, inviting that Court to disagree with the construction placed by the learned Judge upon the words in question. But on 8th April 1937, having presumably by that time come to the conclusion that the learned Judge was right in his view as to the impossibility of defining the words with any accuracy, the appellant gave notice of her intention of submitting upon the hearing of the appeal that the clause containing the words was a condition subsequent and as such was void for uncertainty. She had, in other words, determined to avail herself if possible of the principle enunciated by Lord Cranworth in (1859) 7 H L C 707.[1] In that case a testator devised his real estate to the children of his son for what were held to be vested equitable estates in tail liable to be divested on breach of a condition subsequent. The condition was in these terms :

Provided further and I do hereby declare that the devises hereinbefore contained to the children of my said son are made upon this express condition, that the children of my said son be educated in England and in the Protestant religion according to the rites of the Church of England, and in case any one or more of such children shall be educated abroad, or not in the Protestant religion according to the rites of the Church of England,

1. Clavering v. Ellison, (1859) 7 H L C 707=29 L J Ch 761.

then I do hereby revoke all and every devise to such child or children so educated as aforesaid.

Questions having arisen whether there had been a breach of this condition subsequent in the case of some of the son's children, the matter ultimately came before the House of Lords. It was held by Lord Campbell L. C. that the condition had not in fact been broken. Lord Cranworth agreed with the Lord Chancellor that there had been no breach of the condition as to the children being educated in the Protestant religion. But he did not find it necessary to come to any definite conclusion upon the question whether the children had in fact been educated abroad as he held the condition to be void for uncertainty. He said (page 725) :

> I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.
>
> In my opinion, if there was no direct authority for it, I should still have arrived at the same conclusion; but I have looked at the authorities, especially that of Lord Eldon in the case of *Fillingham* v. *Bromley*.[2] I think that looking at the language here used, it is far too indefinite and uncertain to enable the Court to say what it was that the testator meant should be the event on which the estate was to determine.

Then, after giving instances in which it would be difficult to say whether a child had or had not been educated abroad, he added this :

> But the question is, not whether in the particular case he was educated abroad, but whether you can predicate on reading the will, what it was that was to defeat the vested estate? I concur in Lord Eldon's observations about an estate being defeated by a person not living and residing in a particular house, which he thought too remote; and I think that this is far more remote than that.

Much to the same effect has been said in later cases, of which it will be sufficient to mention three. In (1912) 2 Ch 471[3] at page 477, Parker J. stated the principle in these words :

> Conditions subsequent, in order to defeat vested estates, or cause a forfeiture must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur.

In (1883) 23 Ch D 158[4] at page 164, Fry J. used the following language :

> The condition must be clear and certain. That, in my opinion, includes not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect.

These words of Fry J. were considered by Russell J. in (1927) 2 Ch 264.[5] He said (page 269) :

> They do not, I think, mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision the nature of which is clearly expressed.

Their Lordships respectfully agree. If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. But this is implied in the language used by Fry J. He said that it must be "ascertainable" whether the provision has taken effect or not; not that it must be ascertained in fact by the person affected or even ascertainable by him without difficulty. In the particular case with which Russell J. was dealing, the condition was that a person should not marry a relation by blood. The learned Judge held the condition to be void as tending to the prohibition of marriage altogether. He declined however to hold it void for uncertainty inasmuch as he considered the meaning of blood relationship to be clear enough. If the words included the whole of the human race the person affected by the condition would know that any and every marriage would cause a forfeiture, and the condition though bad on other grounds would not be void for uncertainty. If however they did not include the whole human race, and presumably they could not have been intended to do so, the testator had failed to specify the number of generations in which no common ancestor of the spouses was to be found; and in their Lordships' opinion and with all respect to the learned Judge, the condition might on that ground have been held to be void for uncertainty. Had any particular number of generations been specified, the fact that it might be difficult to ascertain whether or not there was a common ancestor in such generations would not, their Lordships respectfully agree, have rendered the condition void. For, whether there was such a common ancestor or not would necessarily be ascertainable if the search were sufficiently diligent.

2. (1823) Turn & Russ 530=24 R R 136.
3. In re Sandbrook, (1912) 2 Ch 471=81 L J Ch 800=107 L T 148=56 S J 721.
4. In re Exmouth (Viscount), (1883) 23 Ch D 158 =52 L J Ch 420=48 L T 422=31 W R 545.
5. In re Lanyon, (1927) 2 Ch 264=96 L J Ch 487 = 137 L T 806 = 71 S J 865=43 T L R 714.

In the present case the appellant raised the contention before the Court of Appeal that it is impossible to tell with any certainty what she may do in the matter of absence from Canada without incurring the risk of losing her income under her father's will; and that the provision for cessation of payment of that income is a condition subsequent, which in accordance with the principle laid down in the cases to which reference has been made is void for uncertainty. In view of this contention on her behalf, the Official Guardian had on 21st April 1937 been appointed to represent the grandchildren of the late Sir Clifford Sifton mentioned in the will and also any unborn infants. It had also been ordered that the widow of the testator might be represented at the hearing of the appeal. She did not however avail herself of this order — nor was she represented at the hearing before their Lordships. The appeal came on for hearing on 17th June 1937, before the Chief Justice of Ontario, Latchford C. J., Fisher and Henderson JJ.A. and Kingstone J. In the result it was dismissed (Henderson J.A. dissenting) though the Court varied the judgment of Middleton J. in manner indicated later.

The learned Chief Justice of Ontario was of opinion that there is nothing uncertain or ambiguous about the words "to reside in Canada." The words "to reside," he said, have a clear and definite meaning. They mean to live in a place. But he agreed that a person residing in Canada does not cease to reside or to live in Canada because he goes abroad occasionally for business or pleasure. An unmarried woman, he said, having no actual residence of her own in Canada and having no profession or occupation to which she is devoting her life in Canada may be said to be residing wherever she is living for the time being. If such a person, he said, left Canada, save for a limited period for a purely temporary purpose, a Court might conclude that she had ceased to reside in Canada. He did not however say what would be a "limited" period or what would be a "purely temporary" purpose. He added, indeed, that whether or not the appellant had at any time ceased to reside in Canada would be a question of fact which would have to be determined in view of all the circumstances. Latchford C. J. said that he agreed in substance with the Chief Justice of Ontario. But he too, refrained from indicating with any precision what were the obligations imposed upon the appellant by the condition in question. He did not think that the Court could at present be properly called upon to decide how long or what was the period for which Miss Sifton might absent herself from Canada without infringing the restriction imposed upon her as to residing in Canada. If that question should arise at any time, the executors, he said, must apply their judgment to it whatever the consequences. Fisher J.A. (according to the report of his judgment supplied to their Lordships) said that what the word "reside" means and what the testator meant it to mean was that his daughter must live in Canada and make Canada her permanent place of abode. The word "permanent" however would appear to be a clerical error in the report for "principal." For he agreed with the other members of the Court that absence from Canada would be permissible for definite and particular purposes and for definite periods of time. But he too refrained from indicating with precision either the purposes or the periods that would be permissible. It is, he said, always a question of fact for the executors to determine before making payments of income, to satisfy themselves that the daughter has up to that time resided and continued to reside in Canada. Kingstone J. said that on the argument he was of opinion that the words "as long as she shall continue to reside in Canada" were so indefinite and uncertain as to be incapable of being properly and satisfactorily determined, but that on further reflection he thought the words "to reside in Canada" must be held to mean what they say: "to live in a place," namely Canada. But he added that it might well be that when certain events (which he did not specify) happened there would be difficulty in saying whether or not they fell within the proviso in the will, but that that was not a matter with which the Court were then concerned or on which it should attempt to express itself. Henderson J.A. dissented. He was of opinion that the clause in question was a condition subsequent and was void for uncertainty on the principle enunciated in (1859) 7 H L C 707.[1]

By the order of the Court of Appeal as drawn up, the judgment of Middleton J. was varied and as varied was ordered to be as follows :

1. This Court doth declare—

(1) That the clause or condition, 'The payments to my said daughter shall be made only so long as

she shall continue to reside in Canada,' used in the said last will and testament, is not void for uncertainty.

(2) That the true intent, meaning and construction of the said clause or condition is that the words 'to reside in Canada' are equivalent to 'to live in Canada.'

(3) That leaving Canada for a limited period and for a purely temporary purpose with the intention of returning to Canada and actually returning when the temporary purpose is accomplished, would not be a breach of the condition.

(4) That the absence of the said daughter from Canada abroad between October 1934 and September 1935, pursuing her studies as part of her University course, does not work a forfeiture of such interest.

And doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that the questions propounded in the Notice of Motion do not now admit of categorical answers but the parties may apply to this Court from time to time, as circumstances arise, for the advice, opinion and direction of the Court on the matters in question.

With the greatest respect to the majority of the Court of Appeal, their Lordships are unable to agree with their decision. If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of Lord Cranworth, the Court and their Lordships venture to add, the parties concerned can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease. In their Lordships' opinion, it is impossible to define these events precisely or distinctly. Henderson J. A. said that a cogent argument for this conclusion was furnished by the statement of Middleton J. in the Court below, that it was impossible for the Court to determine with any accuracy what future conduct would fall within the terms of the will. Their Lordships agree. But they also venture to think that equally cogent arguments are to be found in the reasons of the majority of the Court of Appeal and in the formal judgment of that Court. None of those learned Judges defined or attempted to define precisely or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so they must, in their Lordships' judgment, have failed because they would have been attempting the impossible.

Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words reside and residence and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain however that in the present case the word "reside" means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that so long as she maintained a residence in Canada she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods. The result is that the majority of the Court of Appeal have found themselves unable to give any more precise direction than that the appellant may leave Canada for a limited period and for a purely temporary purpose, without being able to define either the word "limited" or the word "temporary." It necessarily followed that they, in common with Middleton J. were of opinion that the questions propounded in the trustees' notice of motion do not at present admit of categorical answers. Their Lordships are of the same opinion. But if the appellant's interest under the will is to be forfeited upon her "ceasing to reside in Canada," she has a right to have those questions categorically answered; and inasmuch as they cannot be so answered, the words, if constituting a condition subsequent, are void for uncertainty.

It only remains to consider whether the words in question are a condition subsequent. As to this their Lordships feel no doubt. Henderson J. A. was of opinion that the words constituted a condition subsequent and in this as in other respects their Lordships agree both with his conclusions and the reasons he gave for them. Where it is doubtful whether a condition be precedent or subsequent the Court

prima facie treats it as being subsequent. For there is a presumption in favour of early vesting. It was said on behalf of the official guardian that even without the condition the appellant took no vested interest in the income of the testator's estate accruing between his death and the time she attains the age of 40 years. But, however this may be, the appellant, apart from the condition, would plainly take a vested life interest in the estate as from that time. The condition must therefore be treated as a condition subsequent so as not to interfere with the vesting of that interest. It was further contended on behalf of the official guardian that the words in question merely limit the duration of the trust for payment and are not in the nature of a condition at all. But the trusts for payment to the appellant are quite distinct from the words with which their Lordships are concerned and which are in a separate clause. These words do not, in their opinion, qualify the trusts for payment. They are merely designed to abrogate the trusts in a certain event. In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event, and a trust to pay that is abrogated on the happening of that event. But the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain and it will be the clause of abrogation that will fail.

For these reasons their Lordships are of opinion and will humbly advise His Majesty that this appeal should be allowed; that the judgment of Middleton J. as varied by the Court of Appeal should be set aside except in so far as it dealt with the costs of the hearing of the motion and of the appeal; and that a declaration should be made that the clause in the will of the testator directing that the payments to the appellant should be made only so long as she continues to reside in Canada is void for uncertainty. The costs of all parties represented on this appeal, those of the respondent trustees and the official guardian as between solicitor and client, should be paid out of the estate of the testator.

B.D./R.K. *Appeal allowed.*

Solicitors for Appellant —
Lee & Pembertons.

Solicitors for Respondents — Charles Russell & Co. and Blake & Redden.

A. I. R. 1938 Privy Council 276

(From N. W. F. P.)

22nd July 1938

LORDS WRIGHT, ROMER AND PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Peoples Bank of Northern India Ltd. — Appellants.

v.

Mian Ghulam Jan and another — Respondents.

Privy Council Appeal No. 1 of 1938.

Pardanashin Lady—Explanation of transaction to her and her knowledge of what she was doing must be proved.

The rule is firmly established that it is incumbent on the Court, when dealing with the disposition of her property by a pardanashin woman, to be satisfied that the transaction was explained to her and that she knew what she was doing. [P 277 C 1]

A husband executed a mortgage of a house which was owned by him and his wife in equal shares. In order to make her share liable, the wife affixed her thumb impression to the mortgage deed. The wife was a pardanashin lady unable to read or write and there was no evidence to prove that she knew or understood the contents of the mortgage deed. The endorsement made by the Sub-Registrar at the time of the registration of the deed did not show that either he or any other person explained the deed to her :

Held that her share was not liable. [P 277 C 1]

A. M. Dunne and J. M. Pringle — *for Appellants.*

J. P. Eddy and M. H. Rashid — *for Respondents.*

Sir Shadi Lal. — The respondent, Mian Ghulam Jan, carried on the business of buying and selling carpets at Peshawar; and for the purpose of his business he borrowed money from the appellants, the Peoples Bank of India, Limited, on what is called "cash credit account." He got also another loan from the Bank, for which he executed a promissory note on 29th August 1930, and pledged his carpets as security for the payment of the debt. At the end of April 1931, his liability to the bank amounted to Rs. 3110-7.9 on the cash credit account, and to Rs. 11,740.14.3 on the promissory note account. The total sum due by him was Rs. 14,851-6.0. He did not discharge his liability, with the result that the creditors threatened to bring an action against him to realize the debt by selling his carpets. The debtor however got a postponement of the time for payment, by executing a mortgage deed in favour of the creditors. The mortgage deed was written to secure the payment of the amount due by the debtor on

the two accounts, and also of Rs. 148-10-0 which was paid to him at the time of the transaction in order to make up the round sum of Rs. 15,000. The security for the payment of this consolidated sum was a house, which was owned by him and his wife Mt. Mohamadi Begum in equal shares. In order to make her share of the house liable for the mortgage money, she affixed her thumb impression to the mortgage deed, which contained various stipulations, including the promise to pay the mortgage money with interest at 9 per cent. per annum within one year. It was agreed that the creditors would not be entitled to recover the mortgage debt before the expiry of one year, but that they could enforce their claim after the expiry of the stipulated period in the event of the mortgagors' failure to pay the debt.

The promise as to the payment within one year was not fulfilled by the mortgagors, and the bank consequently brought the present action against them to enforce their personal liability and also to recover the debt by the sale of the house, which was mortgaged as security for it. The Courts in India have concurred in granting a decree against the husband, but have exempted the wife and her share in the house from liability. The decision of the Appellate Court has proceeded on the ground that there was no consideration for her promise to pay the debt of her husband. There is no evidence to prove that Mt. Mohamadi Begum, who was admittedly a pardanashin lady unable to read or write, knew or understood the contents of the mortgage deed which sought to make her share in the house liable for the payment of the debt. The endorsement made by the Sub-Registrar at the time of the registration of the deed is in ambiguous language, and does not show that either he or any other person explained the deed to her. The rule is firmly established that it is incumbent on the Court, when dealing with the disposition of her property by a pardanashin woman, to be satisfied that the transaction was explained to her and that she knew what she was doing. This plea was expressly raised by Mt. Mohamadi Begum, but no issue was framed on the subject, except the issue as to her executing the deed under the influence of her husband. Their Lordships, upon the record, as it stands, are unable to hold that her liability has been established. On this view, the question of consideration need not be discussed, more particularly, as apart from the deed, there is no evidence to show that it was in response to Mt. Mohamadi Begum's request that the bank stipulated not to enforce the liability of her husband during the period of one year mentioned in the deed. The appeal therefore fails, and must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

D.S./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Cardew Smith & Ross.

Respondents Ex parte.

A. I. R. 1938 Privy Council 277

(From Lahore)

17th October 1938

LORDS WRIGHT, ROMER, PORTER AND SIR GEORGE RANKIN

Lala Nand Kishore — Appellant.

v.

Azmat Ulla, Official Receiver, Delhi, and another — Respondents.

Privy Council Appeal No. 66 of 1936.

(a) Partnership—Purchase and reconstruction of houses for partnership—One of partners paying more than his share—Other partner made liable to pay interest to former—Such excess paid held loan individually to latter and not to partnership.

Certain houses were purchased and reconstructed by two persons who had formed into a partnership, the object of which was to make profit by letting them or selling them. One of the partners had paid more than his share of purchase money and cost of reconstruction and it was mentioned in the partnership deed that the other partner and not the partnership itself was to pay interest on such excess to the former :

Held that the excess paid by the former was to be treated as a loan to the latter partner individually and not as a loan made to the partnership.

[P 279 C 1 ; P 280 C 2]

(b) Partnership—Insolvency of partner—One partner advancing money to another for acquiring his share in partnership—Former does not merely by this get lien on latter's share.

The mere circumstance that a partner has advanced money to another partner to enable him to acquire share in the partnership will not give the former a lien on the latter's share in the partnership property. He cannot be placed on a footing higher than that occupied by the other creditors on the latter partner's insolvency.

[P 280 C 2]

A. M. Dunne and R. K. Handoo —
for Appellant.

Ex parte Respondents.

Lord Romer—This is an appeal from a decree of the High Court of Judicature at

Lahore dated 16th November 1933, setting aside a decree of the Senior Subordinate Judge at Delhi dated 5th August 1929, in an action in which one Lala Shibba Mal (since deceased and now represented by the appellant) was plaintiff and respondent 2; Rai Sahib Rup Narain was originally the sole defendant. The defendant having become insolvent, respondent 1, the Official Receiver, Delhi, was added as a party to the suit. The short question to be determined is whether a sum of Rupees 1,66,570, that admittedly became due from respondent 2 to Lal Shibba Mal, constitutes, as was held by the Subordinate Judge, a charge upon the interest of that respondent in certain land at Delhi hereinafter referred to or whether, as was held by the High Court, the sum is merely an unsecured debt. The facts giving rise to the appeal are as follows :

On 24th November 1921, the said Rup Narain, therein called the first party, and the said Shibba Mal, therein called the second party, entered into a deed of partnership. As the question in dispute is principally one as to the true construction of that document, it is necessary to consider its provisions in some detail. It begins by a declaration made by the parties to the effect that both the parties had jointly purchased two blocks of property situate in Delhi City near Barh Shahbulla by means of a sale deed, and continues as follows :

Therefore they will abide by the following terms :

1. In the sale deed in respect of the property the name of the second party has been entered as the vendee. But as a matter of fact the first party is the purchaser of three-fourths share, while the second party is the purchaser of one-fourth out of the two blocks mentioned above.

2. The first party has paid Rs. 25,000, and the second party rupees one lac on account of the sale price.

3. Both the blocks of the property have been purchased for Rs. 1,25,000. The first party shall pay interest to the second party at the rate of Re. 0-14-0 (annas fourteen) per cent. per mensem on Rs. 68,750 inasmuch as the latter has invested Rs. 68,750 for the former.

Now as will appear from later clauses in the deed the object of the partnership was to turn the two blocks of property to profitable account either by letting them to tenants or by selling them, and in later clauses of the deed there are provisions such as are commonly found in articles of partnership relating to the management of the partnership property, and the proportions in which the profits and losses were to be shared by the partners. But it is plain that the three clauses above set out are not in strictness terms of the partnership at all. They are rather in the nature of recitals as to the ownership of the properties that are being brought into the partnership by means of which the partnership profits are to be earned, and of provisions as to the financial adjustments to be made between the owners in consequence of the fact that the second party had paid more than his proper share of the purchase money. The excess, therefore, of the lac of rupees which he had paid over Rs. 31,250 (which was his proper share) amounting to Rs. 68,750 was rightly treated as having been invested by him for the first party. It was in effect a loan by him to the first party without security, and the loan was to bear interest at the rate mentioned in clause 3. The circumstances of the case, no less than the language of these clauses, are quite inconsistent with the idea that the Rs. 68,750 was a loan made by the second party to the partnership. Had it been so, it could not possibly have been described as an investment for the first party, and the liability to pay interest on it would not have been imposed on the first party but on the partnership itself.

The next two clauses, however, seem to be true partnership clauses. They are as follows :

4. The first party shall be the owner of three-fourth share while the second party shall be the owner of one-fourth share, out of the entire income of the property.

5. Deeds of rent to be secured from tenants shall be in favour of both the parties. Tenants shall be located and dislocated with the consent and consultation of both the parties.

But then comes a clause concerning which it is more difficult to determine whether it is one relating to the conduct of the partnership business or one relating to something to be done to the property as a preliminary to such business being entered upon. It is in these terms :

6. Both the blocks of the property are in a rotten condition. Hence the first party shall pay Rs. 20 (rupees twenty) per cent. and the second party Rs. 80 (rupees eighty) per cent. towards total cost of construction thereof. The second party shall not get interest on its one-fourth share of the cost of construction, while the first party shall be liable to pay the amount of its own share together with interest at the rate of Re. 0-14-0 (annas fourteen) per cent. per mensem. The second party shall pay one-fourth of the amount spent. The second party shall continue charging interest at the above rate on the surplus amount spent by that party for the first party. For instance, if Rs. 100 are spent, the first party shall pay Rs. 20 (rupees twenty) and the second party shall charge interest on Rs. 55 (rupees fifty-five) from the first

party leaving Rs. 25 (rupees twenty-five) without interest out of the remaining sum of Rs. 80 (rupees eighty).

The reconstruction of the premises might well have been made a partnership affair and the cost might well have been provided for by advances made by the parties to the partnership. But in that case interest on the money advanced by the second party in excess of one-fourth of the cost would be paid to him by the partnership, i.e. out of the partnership funds, before any division of the partnership profits, and not, as is provided by the clause, by the first party personally. Nor could such excess have possibly been described as being spent by the second party for the first party. It would have been spent for the partnership. Their Lordships are accordingly of opinion that clause 6 must be treated as a clause that was intended not to govern the relationship between the parties as co-partners, but the relationship between them as co-owners of a property that was after reconstruction to be the subject-matter of the partnership. In other words, their Lordships are of opinion that any sum paid by the second party towards the cost of reconstruction in excess of his quarter share is to be treated as a loan made by him to the first party individually and not as a loan made to the partnership. This view is corroborated to some small extent by a consideration of clauses 7 and 8. For, clause 7 provides that the work and the management of construction shall be carried on with the consent and the consultation of both parties, whereas clause 8, which seems to be addressed to the period after the construction has been completed, says this :

8. The first party resides in Delhi. Hence the said party shall manage the entire affairs connected with the property, get necessary repairs effected thereto and keep a regular account thereof and render the same monthly.

Further confirmation of the view is to be found in clauses 9 and 10 which regulate the partnership dealings in the alternative cases of the property being retained as an income producing concern, and of the property being sold at a profit. Both clauses in terms deal only with the property after reconstruction.

On 6th June 1924, a supplemental deed of partnership was entered into by the parties. It provided for the bringing into the partnership of an additional plot of land to which the parties were entitled in the same proportions as before, but does not otherwise materially affect the position. It does, however, once more refer to the interest on the sums paid by the second party in excess of his quarter share whether in connexion with the original purchase or in connexion with the reconstruction of the properties as interest which is chargeable from the first party and which the first party is bound to pay to the second party.

The reconstruction of the buildings proceeded and the plaintiff Shibba Mal paid into Rup Narain's account sums amounting, as he alleged, to some Rs. 43,000 towards the cost thereof. But he was unable to obtain from Rup Narain repayment of either the Rs. 68,750 and interest thereon mentioned in the deed of partnership or the excess of the Rs. 43,000 over his quarter share of the cost of the reconstruction. Nor, as he alleged, could he even obtain from Rup Narain any satisfactory account of the way in which the Rs. 43,000 had been expended. Accordingly, on 6th January 1926, he instituted the present suit against Rup Narain praying for a decree against the defendant for Rs. 90,750, being the Rs. 68,750 with accrued interest amounting to Rs. 22,000, and also an account of Rup Narain's dealings with the moneys paid by the plaintiff towards the expenses of the rebuilding and payment by the defendant with interest of the amount found due to the plaintiff on taking such account. It is interesting to observe that this was in no sense a partnership action. It neither claimed a dissolution and winding up of the partnership nor the taking of any partnership accounts. It was an action against the defendant in his personal capacity, and sought to make him and not the partnership assets liable for repayment of the sums alleged to be due. It was indeed alleged by the plaintiff in his petition of plaint that both the Rs. 68,750 and the Rs. 43,000 had been paid into the account of the defendant and not into the partnership account. He did, however, contend that the defendant's share in the property was "hypothecated with the plaintiff till the amount due is paid off which forms a charge thereon." The defendant in his written statement raised various defences of which it is only necessary to refer to two. He alleged that the suit was not maintainable unless the plaintiff asked for a dissolution of the partnership and he denied that any sums due to the plaintiff constituted a charge upon his share in the property at Delhi. He also alleged that one Gopi Nath had with the consent of both parties been appointed to

keep accounts of the expenses of the rebuilding operations. It would seem from this written statement that the defendant was endeavouring to maintain that the sums advanced by the plaintiff were advanced to the partnership and not to the defendant personally. He does not appear to have observed that if this were true the sums were in effect charged upon the property. For, in the winding up of the partnership the property would have to be sold and loans made by a partner to the partnership would after payment of other creditors be applied in repayment of such loans. If, on the other hand, as the plaintiff seemed to be contending, the advances were made to the defendant personally, they would not in the absence of express agreement, and admittedly there was none, be so charged at all.

By the time the case came on for hearing before the Subordinate Judge the position had altered to some extent. The defendant had become insolvent, and the Official Receiver, had been added as a party. The parties, moreover, had agreed upon a dissolution of the partnership, the property at Delhi being retained in specie by the parties as to three-fourths by the defendant, and as to one-fourth by the plaintiff. The accounts kept by Gopi Nath had been agreed between the parties and the amount shown by those accounts to be due to the plaintiff was Rs. 1,66,570. Their Lordships have not been supplied with a copy of those accounts, and they do not, therefore, know how the balance found due to the plaintiff was arrived at. But it does not appear that any profits ever accrued to the partnership from lettings of the property, and there were no outside creditors to be dealt with. It may therefore be assumed that the balance in question was entirely composed of the Rs. 68,750 and the excess contributed by the plaintiff to the rebuilding operations over his own one-fourth share, together with accrued interest on those sums. In these circumstances the only question to be decided at the hearing was whether these sums were to be treated as having been advanced by the plaintiff to the defendant personally or to the partnership. It was held by the learned Senior Subordinate Judge that the Rupees 1,66,750 were a partnership debt. "The amount due to Shibba Mal", he said

> is Rs. 1,66,750 of the Barshah Bulla property. Rup Narain's share is three-fourths in the property. Before he can get his share, the partnership debt due to Shibba Mal must be paid by him. His share, therefore, is liable for the amount.

On the assumption that the debt was a partnership debt, it is not, with all respect to the learned Subordinate Judge, easy to understand why the defendant's three-quarters share in the property should be saddled with the whole of it and not merely three-fourths. But in view of the conclusion to which their lordships have come as to the nature of the debt this is not material. From this judgment and the decree founded upon it an appeal was taken to the High Court. It came on for hearing before Sir Shadi Lal and Abdul Rashid J. The appeal was allowed. Sir Shadi Lal in the course of his judgment, in which Abdul Rashid J. concurred, said that he was unable to accede to the contention that the loan was made by the plaintiff to the partnership and not to Rup Narain personally. He then referred to Cls. 1, 2, 3 of the deed of 24th November 1921, mentioning in particular the statement in Cl. 3, that the Rs. 68,750 had been invested by Shibba Mal for Rup Narain. "The language of this document," he said,

> makes it clear that the aforesaid sum was advanced as a loan to Rup Narain and not to the partnership.

He then referred to Cl. 6, as pointing to a like conclusion in reference to the cost of rebuilding, a clause which he pointed out was substantially repeated in the supplemental deed of 6th June 1924. He then proceeded as follows :

> In the face of these express covenants it cannot be contended that the plaintiff advanced the money to the partnership, and should, therefore, be regarded as a creditor of the firm.

Then after referring to the way in which debts of a partnership are provided for on a dissolution, he added this :

> Now, the money due to the plaintiff is not a debt of the partnership, and cannot be recovered from the partnership property. The question then arises whether, as against Rup Narain's share in the surplus, if any, of the partnership property, the plaintiff can claim priority over the other creditors of the debtor. It is true that the plaintiff advanced the money to Rup Narain to enable him to acquire his share in the estate, but our attention has not been invited to any authority in support of the proposition that that circumstance alone would give the former a lien on the latter's share in the partnership property. There is neither any statutory rule nor any general principle which would place the plaintiff on a footing higher than that occupied by the other creditors of the insolvent. His claim for priority over other creditors must, therefore, be disallowed.

With these observations of Sir Shadi Lal their Lordships desire to express their respectful agreement. Their Lordships will

therefore humbly advise His Majesty that the appeal should be dismissed. As the respondents have not appeared, there will be no order as to costs.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellant —
Hy. S. L Polak & Co.

Respondents Ex parte.

A. I. R. 1938 Privy Council 281

(From Calcutta : A I R 1937 Cal 94)

17th October 1938

LORDS WRIGHT, ROMER, PORTER AND SIR SHADI LAL AND SIR GEORGE RANKIN

Kumar Kamalaranjan Roy —
Appellant.

v.

Secretary of State —Respondent.

Privy Council Appeal No. 68 of 1937: Bengal Appeals Nos. 32 and 33 of 1936.

(a) Bengal Tenancy Act (8 of 1885), S. 114 —Purchaser of zamindari estate sold under Bengal Land Revenue Sales Act for arrears of land revenue, is not liable after he has annulled the under-tenures, for unpaid balance of costs of preparation of Record of Rights, which has been apportioned on patnidars prior to his purchase and annulment of under-tenures—R. 414 of Bengal Survey and Settlement Manual does not apply: *A I R 1937 Cal 94=167 I C 741, Reversed.*

A purchaser of a zamindari estate sold under the provisions of the Bengal Land Revenue Sales Act for the recovery of arrears of land revenue, is not liable, after he has annulled, as he is entitled to do under Sec. 37, Bengal Land Revenue Sales Act, the under-tenures, for the unpaid balance of the costs of the preparation of a Record of Rights of the estate, which has been duly apportioned on the patnidars of the estate prior to his purchase of the estate and the annulment of the under-tenures. When the purchaser, under S. 37, of the entire estate elects to avoid and annul under-tenures they cease to exist and when they have ceased to exist, the charge imposed on them in respect of the costs also ceases to exist. And R. 414 of the Bengal Survey and Settlement Manual does not apply as it does not purport to deal with a case of the annulment of under-tenures but deals only with death, transfer or abandonment. An abandonment cannot be construed as including an annulment: *A I R 1931 P C 314, Ref.; A I R 1937 Cal 94 =167 I C 741,* **Reversed.** [P 281 C 2; P 283 C 1]

(b) Interpretation of Statutes — Powers of Court—Court cannot put words which are not expressed and which cannot be implied.

The Court cannot put into an Act words which are not expressed and which cannot reasonably be implied on any recognized principle of construction. That would be a work of legislation, not of construction and outside the province of the Court. [P 283 C 2]

A. M. Dunne, Sir Thomas Strangman and C. Bagram — *for Appellant.*

J. Millard Tucker and J. M. Pringle *for Respondent.*

Lord Wright.— The appellant in these consolidated appeals is the purchaser of a zamindari estate sold under the provisions of Act 11 of 1859 for the recovery of arrears of land revenue. The question is whether he is liable, after he annulled, as he was entitled to do under Sec. 37 of Act 11 of 1859, the under-tenures, for the unpaid balance of the costs of the preparation of a Record of Rights of the estate, which had been duly apportioned on the patnidars of the estate before the purchase by the appellant of the estate and the annulment of the under-tenures. The appellant was plaintiff in the action; he had paid under protest the amount demanded from him by the Government and was claiming repayment. The facts are short and not in dispute. The estate in question is in the District of Murshidabad. In 1923 settlement operations were commenced and these were completed in November 1928. Thereupon the provisions of Sec. 114, Ben. Ten. Act, 1885, came into effect. These provisions, so far as relevant, are as follows :

Section 114 (1).—When the preparation of a Record of Rights has been directed or undertaken under this Chapter, in any case except where a settlement of land revenue is being or is about to be made, the expenses incurred in carrying out the provisions of this Chapter in any local area, estate, tenure or part thereof (including expenses that may be incurred at any time, whether before or after the preparation of the Record of Rights, in the maintenance, repair or restoration of boundary marks and other survey marks erected for the purpose of carrying out the provisions of this Chapter), or such part of those expenses as the Local Government may direct, shall be defrayed by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments (if any), as the Local Government, having regard to all the circumstances, may determine.

* * * *

(3) The portion of the aforesaid expenses which any person is liable to pay shall be recoverable by the Government as if it were an arrear of land revenue due in respect of the said local area, estate, tenure or part.

* * * *

The settlement having been completed the costs which in the first instance were borne by the Government, were apportioned in accordance with an order of the Governor-in-Council dated 12th June 1928, as between landlords and raiyats and in particular permanent tenure-holders whose rent was fixed in perpetuity were to pay

their own share of the costs and that of the landlords superior to them. The patnidars were accordingly liable to pay the whole of the 15 annas per acre share which was apportioned as the liability of the landlords in respect of the total cost of Re. 1-8-0 per acre. The raiyats' share was thus 9 annas per acre.

On 28th March 1930, the appellant purchased the estate in question, which was No. 7 in the Murshidabad Collectorate, and lay within the limits covered by the Record of Rights, in a revenue sale held under the provisions of Bengal Act 11 of 1859. At that time the patnidars had paid some part of the amounts apportioned on them, but some balances were still unpaid. In respect of these unpaid balances, the certificate procedure under the Bengal Public Demands Recovery Act 1913 came into force, in particular S. 8, which provides that on the service of notice of a certificate under S. 7 of the Act, the certificate-debtor is debarred from transferring or delivering any of his immovable property in the district in which the certificate is filed or any interest in that property, and that the amount due from time to time should be a charge on the immovable property of the certificate-debtor, wherever situate, to which any subsequent charge was postponed. It appears and is not contested that certificates complying with the Act were duly signed and filed by the certificate officer in respect of the arrears of the apportioned costs and notices duly served on the defaulters. The zamindars duly paid such amounts as were apportioned against them. Thereafter in 1930 the appellant purchased the estate under S. 37 of the Act 11 of 1859 which is in the following terms :

Section 37.—The purchaser of an entire estate in the permanently settled Districts of Bengal, Behar and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions . . . .

It has been held by this Board in 58 I A 440[1] that the Section distinguishes between incumbrances and under-tenures. Encumbrances are wiped out by the sale; in the case of under-tenures the purchaser is entitled to avoid and annul and it is only on his doing so that he can eject all under-tenants. In the present case the appellant immediately after the purchase annulled all the under-tenures, that is the patnis or estates of the patnidars in question, the rights of the raiyats being preserved by the Proviso to Sec. 37. It is not contested that the appellant duly annulled the patnidars' estates, which thereupon became void and ceased to exist. Thereupon the certificate officer purported to transfer the certificates in regard to the patnidars who were still in default into the name of the appellant and caused notices and copies of the certificates to be served on the appellant and demanded payment of the amounts from him. He paid under protest and brought the present actions for cancellation of the certificates filed against him and for the recovery of the amount so paid. The Subordinate Judge decided in favour of the respondent. His judgment, which was quite short, proceeded on the footing that because the appellant was in possession of the lands of the patnidars in respect of which the costs were assessed, he was liable for the costs. In particular he proceeded on R. 414 of the Bengal Survey and Settlement Manual, which is in the following terms :

Rule 414.—If before the amounts are collected a landlord or tenant dies or transfers or abandons his estate or tenancy or any part thereof, recovery may be made from the person in possession of the former holder's interest.

On appeal the District Judge reversed that decision. He held that the terms of Rule 414 did not apply to a case of the annulment of the patnidars' estates, the appellant not being in possession as successor in interest of the patnidars but of the zamindar, and also that the assessment was not made on a possession in the land, but upon a person's interest in the land. He held that the appellant was entitled to recover with costs and with interest at 6 per cent. on the decretal amount. On appeal that decision was reversed by the High Court, and the suits were dismissed with costs. Their judgment seems to have been based substantially, if not entirely, on the terms of R. 414 of the Manual above referred to; they said,

the conclusion is irresistible that the plaintiff in the case before us having obtained possession of the lands appertaining to the patnis which were annulled by his purchase at a sale for arrears of revenue, was the person from whom the costs of the settlement operations were recoverable.

On the hearing of the appeal before their Lordships, the respondent's counsel have not sought seriously or perhaps at all to uphold the reasons given for deciding in

1. Turner Morrison & Co. v. Monmohan Choudhury, (1931) 18 A I R P C 314=135 I C 765 =59 Cal 728=58 I A 440 (P C).

their favour by the Courts below. They have based their right to uphold the judgment below on two grounds which do not appear to have been taken below and which certainly are not discussed by the Subordinate Judge or by the Judges of the High Court. Counsel are unquestionably entitled to uphold a judgment on any proper ground of law, but their Lordships regret that they have to decide on these new submissions without any help from the Judges in India.

As to R. 414 of the Manual which was relied on in the Courts below, it is enough to say on the construction of that Rule that it does not purport to deal with a case of the annulment of under-tenures but only with death, transfer or abandonment. Abandonment cannot in their Lordships' judgment be construed as including annulment. If however it were so construed, then no statutory authority to justify that provision of the Rule has been produced to their Lordships, which accordingly would be invalid. The appeal before their Lordships has been argued on two main alternative bases. One is that the apportionment is a charge on the land or more accurately on the patnidar's estate or interest in the land. The other is that the liability imposed under S. 114 is not upon those who are landlords' tenants or occupiers at any specified time but upon those who are landlords, tenants and occupiers from time to time so long as any part of the apportionment is outstanding.

As to the first contention, their Lordships do not think it necessary to decide whether the apportionment constitutes a charge on the patni estate or whether it is an impost on the patnidar in respect of his estate, as has been held by the Indian Courts. They will assume for purposes of this argument without deciding that it is a charge on the estate. But when the purchaser, under S. 37, of the entire estate elects to avoid and annul under-tenures, they cease to exist. The power under the Section is in the most absolute terms subject only to the express exceptions set out in the Section but these are not material in this case. It seems incontestable in principle that when an interest charged is avoided and determined, the charge upon it must also cease and determine. There cannot be a charge upon nothing. The charge depends on the existence of the interest charged, just as an under-lease depends on the head lease and falls when the latter falls or is forfeited. On this ground, the respondent's first contention must fail.

His second contention depends on the construction of Sec. 114 (1) and (3), Ben. Ten. Act. It involves among other difficulties reading into the Section words which are not expressed, namely from time to time. Sub-s. (1) provides for the defrayment of the expenses by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments, if any, as the Local Government, having regard to all the circumstances may determine. The machinery for carrying this provision into effect has already been described. That machinery includes the issue of a certificate addressed to a particular person, which, whatever else it does, enables execution to be levied against all his immovables wherever situated and establishes a prior charge on these immovables in the relevant district. It also provides for devolution of the liability on his death. Sub-s. (3) of S. 114, provides for recovery by the certificate proceeding as if the debt were an arrear of land revenue. The proceedings so provided for point, in their Lordships' judgment, to the certificate creating a debt as against the specific person against whom the certificate is filed; the debt is to be executed against his estate, with stringent safeguards against his parting with that estate and is to pass on his death. All these provisions seem quite inconsistent with a shifting liability passing from the certificate debtor to any new landlord to whom the estate may pass. The fact seems to be that the various Acts have provided for all contingencies as to transmission and devolution of the estate, but have not provided for the special case in which the patni estate is not transmitted or devolved, but annulled and determined. It may be that there is here a *casus omissus*, but if so, that omission can only be supplied by statute or statutory action. The Court cannot put into the Act words which are not expressed, and which cannot reasonably be implied on any recognized principles of construction. That would be a work of legislation, not of construction, and outside the province of the Court. It is said that it is reasonable that the holder of the estate from time to time who gets the benefit of the survey should have to bear the cost till it is entirely discharged and also that in practice this principle has been assumed and acted upon. That may well be so. But the question having been raised

must be decided on legal principles and on the relevant statutes. If these do not give any such powers as the respondent claims, the difficulty can only be remedied by a change in the law.

Their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside and the decree of the District Judge restored, and that it should be ordered that the respondent pay the appellants' costs of this appeal and in the Courts below. They will humbly so advise His Majesty.

R.M./R.K. *Appeal allowed.*

Solicitors for Appellant —
W. W. Box & Co.

Solicitors for Respondent —
Solicitors, India Office.

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* A. I. R. 1938 Privy Council 284

(From Lahore)

17th October 1938

LORDS WRIGHT, ROMER, PORTER AND SIR SHADI LAL AND SIR GEORGE RANKIN

Smt. Premila Devi and others —
Appellants.

v.

Peoples Bank of Northern India Ltd. (in Liquidation) — Respondents.

Privy Council Appeal No. 84 of 1937.

*** (a) Companies Act (1913), S. 153 — Scheme confirmed by Court can be varied only by order of Court after approval of variation by creditors and shareholders.**

Upon confirmation by the Court of a scheme of arrangement, that scheme becomes by virtue of S. 153 binding upon the creditors, the shareholders and the Company. Its terms can thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders and it is not possible for the Company or its directors or shareholder whether by resolution or ratification or otherwise to alter the scheme. Nor is it possible for the Company or its directors to vary the scheme under the guise of a compromise with a shareholder, as no variation or departure from that scheme can be validated by mere acquiescence of the shareholders or the creditors. [P 288 C 1, 2; P 289 C 1]

*** (b) Company — Forfeiture of shares — Creditors and not merely shareholders are entitled to insist upon strict fulfilment of conditions — Forfeiture of shares for non-payment of calls not yet due is not valid.**

In the matter of the forfeiture of shares, technicalities must be strictly observed. And it is not, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a Company. The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly. [P 288 C 2; P 289 C 1]

Where the power of a Company to forfeit shares has arisen, the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the Company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due. [P 289 C 1]

*** (c) Company—Act of directors ultra vires — Ratification by shareholders is not valid unless illegal nature of act is known to them.**

To render valid an act of the directors of a Company which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz. the acquiescence of each and every member of the Company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. By knowledge of the transaction is clearly meant knowledge of the invalidity of the transaction. There can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality : *(1869) 3 H L 171, Foll.; (1877) 2 A C 366 Rel. on.* [P 289 C 2]

A. M. Dunne and J. M. Pringle — *for Appellants.*

Lionel C. Cohen and W. Wallach — *for Respondents.*

Lord Romer.—These are three consolidated appeals from the order of the High Court of Judicature at Lahore dated 10th March 1936, made upon an application by the Official Liquidator of the respondents, the Peoples Bank of Northern India, Limited. The question to be determined is whether the appellants should be placed upon the list of contributories notwithstanding the fact that in the year 1933 the directors of the bank purported to forfeit the appellants' shares, and removed the appellants' names from the register of members in respect thereof. The bank was incorporated in the year 1925 under the Indian Companies Act with a capital of 50 lacs of rupees divided into 50,000 shares of Rs. 100 each. These shares, all of which were issued, were called "A" shares. In the year 1926, the capital was increased by another 50,000 shares of Rs. 100 each, of which 25,000, called "B" shares, were then issued. In 1929 some of the remaining 25,000 shares were issued and were called "C" shares, but with these the present

appeals are not concerned. On the issue of the "A" and "B" shares Rs. 50 per share had been called up. Of the Articles of Association of the Bank (before they were amended in manner hereinafter stated) those that are material for the present purpose were as follows :

Article 34. — Notice requiring payment of arrears.—Whenever any call, or instalment of a call, payable by any member shall not have been paid on the appointed day, the Company may at any time thereafter during such time as such call or instalment shall remain unpaid, send a notice requiring payment by such further day, and at such place or places where the calls of the Company are usually made payable, of such calls or instalments, in arrear, with interest thereon, at the rate of 9 per cent. per annum from the day on which such call or instalment ought to have been paid, and such notice shall state, that in the event of non-payment at the time and place appointed of the arrear incurred and interest thereon, together with such expenses (if any) as may be incurred in and about the collection or recovery of such call or instalment and interest or any of them, the share in respect of which such call was made will be forfeited without further notice.

Article 35. — If such notice be not complied with, the share may be forfeited.—If the requisitions of any notice given pursuant to Cl. 34, shall not be complied with, any share in respect of which such notice shall have been given, may, without further notice at any time thereafter, unless payment of all calls, interest and expenses, due in respect thereof has been made, be forfeited by a resolution of the Directors to that effect.

Article 36. — Forfeited shares to become property of the Company. — Any shares forfeited under these Articles shall be deemed to be the property of the Company, and may be sold or reallotted or otherwise disposed of, in such manner as the Directors shall approve.

Article 37. — Forfeiture may be remitted.— Until any share so forfeited shall be sold, reallotted or otherwise disposed of, the forfeiture thereof may, at the discretion and by a resolution of the Directors, be remitted on such terms as the Board may in their discretion think fit.

Article 40.—Calls to be made at the discretion of Directors.—All calls in respect of shares shall be made at the discretion of the Directors and shall be payable to the person or persons and at the time and place or places appointed by them.

Article 44.—Interest on calls in arrears.—If the call or instalment of a call payable in respect of any share is not paid by the day appointed for payment thereof the holder for the time being of such share shall be liable to pay interest for the same at the rate of Rs. 9 per cent. per annum from the day appointed for payment thereof to the time of actual payment.

Article 45. — Power to receive in advance moneys uncalled. — The Directors may, if they shall think fit, receive from any member willing to advance the same, all or any part of the moneys for the time being remaining uncalled on his share beyond the calls then actually made, and in case they shall so think fit they shall pay dividend upon the moneys so paid in advance or upon so much thereof as shall from time to time remain in advance of the calls then made upon the share, in respect of which such advance has been made, in addition to the dividend payable on such part of the capital as is actually called and paid up.

Article 46—Power to pay interest on advance in lieu of dividend.—If the Directors shall see fit to receive in advance any such moneys, aforesaid they may pay interest upon the same, or upon so much thereof as shall from time to time remain in advance of the calls, at such rate not exceeding 6 per cent. per annum as they shall think fit, such interest to be in lieu of the dividend provided by the preceding clause upon such moneys so paid in advance.

On 29th September 1931, the Bank suspended payment. Shortly afterwards a scheme of arrangement between the Bank, its creditors and shareholders was prepared, and after being approved in the usual way at meetings of the creditors and shareholders was duly sanctioned by the Court under Sec. 153, Companies Act, upon 22nd December 1931. The details of that scheme are not relevant to these appeals. But by 25th July 1932, it had become evident that the scheme was not likely to attain the end which its promoters had in view, namely the successful resuscitation of the business of the Bank, and accordingly on the last-mentioned date an amended scheme of arrangement was brought before the Court. In the meantime, the directors had, by resolution dated 15th March 1932, made a call of Rupees 20 in respect of the "A" and "B" shares, of which Rs. 10 was to be paid on or before 30th April 1932, and Rs. 10 on or before 20th May 1932. The amended scheme was in due course submitted to meetings of the creditors and shareholders respectively, and having been approved by them was sanctioned by the Court on 15th November 1932. The only provisions of this scheme that are relevant to the present appeals are those contained in Clause 6, which so far as material is in these terms :

6. That for the purposes of the revival of the Bank it be distinctly laid down that further calls on capital of 'A' and 'B' class shares of which Rs. 50 and 25 lacs have been respectively subscribed will not exceed 25 per cent, 20 per cent. having been already called; thus leaving only a further call of 5 per cent. to be made. This 25 per cent. call will be redistributed into 5 calls of 5 per cent. each payable every half-year starting from 1st July 1932.

This clause is not expressed as clearly as it might have been, but their Lordships entertain no doubt as to its meaning. Before the month of March 1932, Rs. 50 had been called up on each of the "A" and "B" shares. On 15th of that month a further Rs. 20 had been called up as already

stated. The clause provided that for the purpose of the revival of the Bank, i. e. for the purpose of the scheme, a further call of Rs. 5 should be made in respect of such shares and no more. Had the clause stopped there, the dates for payment of the Rs. 20 call would have been those already fixed by the directors, viz. as to Rs. 10 thereof the 30th April 1932, and as to the remaining Rs. 10 the 20th May 1932. The further call of Rs. 5 would have become payable on such date as might be fixed by the directors when making the call under Article 40. But the clause went on to fix the dates on which both the Rs. 20 call already made and the Rs. 5 to be made thereafter should be paid. The whole 25 per cent. was "redistributed" and was to be paid in five instalments of 5 per cent. each payable on 1st July 1932, 1st January 1933, 1st July 1933, 1st January 1934 and 1st July 1934. It only remained for the directors to pass a resolution making the further call of Rs. 5 under Article 40, and such call would by virtue of the scheme become payable on 1st July 1934. No further resolution was necessary in respect of the Rs. 20. In the words of Clause 6, it had "already been called." The resolution of 15th March 1932 therefore remained unaffected except that the dates for the payment of the Rs. 20 were altered.

It is to be observed that one effect of the amended scheme, when it came into operation on 15th November 1932, was to make the instalment payable on 1st July 1932, a call in arrear. Another effect was that "A" and "B" shareholders who had punctually paid the call made on 15th March 1932, were probably entitled to be treated as having paid moneys on their shares in advance of calls within the meaning of Articles 45 and 46. These circumstances no doubt introduced some complication into the matter. But, it was nothing compared to the complications introduced by the subsequent proceedings of the directors to which attention must now be called. On 18th January 1933, they held a Board meeting. Their Lordships regret to say that the record of proceedings supplied to them on these appeals would seem to have been prepared with the view of making the discovery of any particular document as laborious a task as possible. But a diligent search, (for no assistance will be obtained from the index of reference), will reveal a minute of this Board meeting. According to this minute the directors, after referring to Clause 6 of the scheme, and recording the fact that many shareholders had made default in payment of the 10 per cent. calls made in the preceding March in whole or in part, passed the following resolutions:

(a) That the remaining call of 5 per cent. on 'A' and 'B' shares as provided for in clause 6 of the Annexure A be made now under Article 34 payable on or before 26th February 1933, and that these shareholders who are partly or wholly in default of already outstanding calls should be called upon under Article 35 to pay up the arrears due with interest at 9 per cent. per annum calculated from due dates to 31st January 1933, at the registered office of the Company at Lahore, Bharat Buildings, on or before the 26th day of February, 1933, in office hours, and that notices to this effect as required by Articles 34 and 35 respectively be served on all 'A' and 'B' shareholders and also on the defaulters, intimating to the latter, i. e. defaulters, at the same time that in the event of non-payment at the time and place appointed all the arrears incurred and interest thereon together with such expenses (if any) as may be incurred in and about the collection or recovery of such calls and interest or any other, the share in respect of which such calls were made will be forfeited without further notice; and that a meeting of the Board will be held on 27th February 1933, to effect forfeiture of the defaulters of the two 10 per cent. calls and the 5 per cent. call or any of them; and that the defaulters who pay up at least 5 per cent. on account of three calls (two of 10 per cent. each of 15th March 1932, and one of 5 per cent. of 18th January 1933), made before 26th February 1933, as an instalment under Cl. 6 of the revised scheme.

(b) A compromise under Article 37 be offered to those share-holders who accept the following terms in regard to the amounts due on account of three calls totalling 25 per cent. and interest due up to 31st January 1933, in terms of Cl. 6 of the Annexure A and but having paid 5 per cent. as per terms of compromise proposed before 26th February 1933, and agreeing to pay the remaining 20 per cent. of calls and interest due as above cited :

5¼ per cent. on all shares held by him on or before 15th June 1933.

5¼ per cent. on all shares held by him on or before 15th December 1933.

5¼ per cent. on all shares held by him on or before 15th June 1934.

5¼ per cent. on all shares held by him on or before 15th December 1934.

at the Head Office of the Bank between office hours on working days and further agreeing that in the event of making a default in any of the instalments as fixed here above, the Bank's Board could take the action as provided for in Arts. 34, 35 and 36 of the Banks Articles of Association.

These resolutions betray a complete misappreciation on the part of the directors of Cl. 6 of the scheme. They had no right whatsoever to make the remaining call of 5 per cent. payable on or before 26th February 1933. It is moreover quite apparent that in passing this resolution they treated the clause as in no way affecting

the dates originally fixed for payment of the 20 per cent. call made in March 1932, and that they were requiring payment of the whole of this call (so far as not already paid) on or before 26th February 1933. This again they had no right to do. The most that they could have done in respect of this 20 per cent. call was to send a notice under Art. 34 requiring payment by 26th February 1933, of the two instalments of 5 per cent. payable on 1st July 1932, and 1st January 1933, with interest at 9 per cent. per annum from those dates respectively, with an intimation that the shares would be forfeited in default of payment of such instalments, interest and expenses as mentioned in the Article. It would also have been within the competence of the directors after any such forfeiture to offer a compromise under Art. 37 to those members who had paid 5 per cent. before 26th February 1933. But they would have had no conceivable right to make it a term of such compromise that the instalments that were payable under the scheme on 1st July 1933, 1st January 1934 and 1st July 1934, should be paid on any other dates.

It is perhaps understandable that the directors should have failed to appreciate the true effect of cl. 6 of the scheme and have thought that it in no way altered the dates for payment of the 20 per cent. call made in March 1933. What is not so understandable is that entertaining the views they did as to the meaning of the clause, they should at the same meeting have passed the following resolution :

Resolved that the following sub-clauses be added to Art. 46 (by two extraordinary general meetings).

That such shareholders who had paid the 20 per cent. of two calls (10 per cent. each payable on 30th April 1932, and 20th May 1932), before 18th January 1933 shall be paid interest at the rate of 6 per cent. per annum from date of payment up to 31st January 1933, and thereafter interest will run on the non-adjusted balance out of the remaining 15 per cent. as per cl. 3 hereof at the rate of 6 per cent. per annum under Article 46 treating the balances at any time as an advance.

Article 46 was subsequently amended in accordance with this resolution. What may be the meaning of the words "non-adjusted balance out of the remaining 15 per cent. as per cl. 3" their Lordships are quite unable to determine. But it is plain that interest could only be allowed to the share-holders who had already paid the two calls of 10 per cent. if those calls were in truth payable on 1st July 1932, 1st January 1933, 1st July 1933 and 1st January 1934, instead of on 30th April 1932 and 20th May 1932 ; that is to say if the dates originally fixed for payment had been altered by the scheme. The calls would not otherwise have been paid in advance. But, however this may be, the directors on 23rd January 1933 sent to the holders of the "A" and "B" shares a notice of the further call of 5 per cent. to be paid on or before 26th February 1933, stating that, in default of payment on or before that date of this further call and of the two previous calls of 10 per cent. each (which they described as payable on 30th April and 20th May 1932, respectively), with interest on such two previous calls at 9 per cent. per annum from the date of the calls to 31st January 1933, the shares would be forfeited without any further notice. It was also stated that shares could be restored after forfeiture on the basis of the compromise mentioned in resolution (b) passed on 18th January 1933. A draft copy of the compromise was enclosed with each notice.

On 25th March 1933, another Board meeting was held. By resolutions passed at this meeting the shares of such shareholders (including several of the present appellants) as had neither made any payment in pursuance of the notice nor accepted the terms of the compromise were forfeited. The shares of those members (including the remaining appellants) who had paid 5 per cent. on or before 25th March 1933, and had accepted the compromise were not forfeited at this time. But later on, default was made by them in paying the instalment of $5\frac{1}{4}$ per cent. payable under the compromise on 15th June 1933; and by 11th November 1933, the shares of all the appellants had been forfeited by the directors.

On 22nd May 1935 an order was made for the winding up of the Bank, the Official Liquidator being appointed the liquidator. By this time the names of all the appellants had been removed from the register of members in respect of the shares which the directors had purported to forfeit. In the cases where the directors had been able to sell the shares the purchasers' names had been entered on the register. The Official Liquidator however inserted the names of all the appellants in the list of contributories, contending that their shares had not been validly forfeited and that their names had been improperly removed from the register. In order to have it determined

whether this contention was well founded he applied to a Judge of the High Court of Judicature at Lahore to have the list of contributories settled by the Court. The question of principle involved was in due course referred by the learned Judge to a Division Bench consisting of the Chief Justice and Munroe J. and they delivered their judgment on 16th March 1936. They held in effect that the resolutions of the directors of 18th January 1933, were inconsistent with cl. 6 of the amended scheme and that the forfeiture of the appellants' shares were ultra vires the Bank and of no effect. They rejected the contention of the appellants that the action of the directors had been ratified by the creditors and shareholders, holding that such ratification even if proved could not validate an ultra vires transaction. But they further held that there was no such ratification in fact. They accordingly accepted the application of the Official Liquidator and ordered the rectification of the register of members so as to include the names of the appellants and others in the like position and settled their names upon the list of contributories. From that decision the appellants, having obtained the necessary leave, now appeal to His Majesty in Council.

In their Lordships' opinion the learned Judges of the Division Bench came to a right conclusion. Upon confirmation by the Court of the amended scheme of arrangement that scheme became by virtue of Sec. 153, Companies Act, binding upon the creditors, the shareholders and the Bank alike. Its terms could thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders. It was not therefore possible for the Bank or its directors or shareholders whether by resolution or ratification or otherwise to alter the dates fixed by cl. 6 of the scheme for payment of the 20 per cent. called up on March 1932 or the 5 per cent. called up on 18th January 1933. It necessarily follows that the resolution of the directors on the latter date requiring the whole 25 per cent. to be paid with interest on or before 26th February 1933 was an attempt on their part to do something that was ultra vires the Bank.

The offer to the shareholders of the compromise was equally beyond the powers of the Bank or its directors. For, apart from the fact that the powers conferred upon the directors by Art. 37 only arise after the share has been forfeited, neither the Bank nor its directors could vary the scheme under the guise of a compromise with a shareholder. The resolutions (a) and (b) of 18th January 1933, except in so far as they made the call of 5 per cent. and the purported forfeitures of the appellants' shares that followed upon them were therefore inoperative and void. It was said on behalf of the appellants that, inasmuch as on 18th January 1933, the two instalments payable on 1st July 1932 and 1st January 1933, were in arrear, the Bank through its directors could have validly forfeited the appellants' shares. This is true. But, it is plain from the terms of the resolutions of 18th January 1933, and of the notice sent to the shareholders on 23rd January 1933, and of the resolution of 25th March 1933, that the shares forfeited on this last date were being forfeited for default in payment of the 25 per cent. by 26th February 1933. This latter resolution was in these terms :

> **The shareholders in respect of the following 'A' and 'B' class shares having made default in respect of calls of 25 per cent., 20 per cent. having been called on 15th March 1932, and 5 per cent. on 18th January 1933, and having neither offered any compromise as allowed by the General Board Resolution No. 2 dated 18th January 1933, nor having made any payment in terms thereof, it is hereby resolved that these shares be and are forfeited. . . .**

It was further contended on behalf of the appellants that inasmuch as the shares of those who had paid at least 5 per cent. by 25th March 1933, were not forfeited until later, and they were given further opportunities of availing themselves of the compromise, the resolution just set out should be regarded as merely forfeiting the shares for non-payment of the 5 per cent. payable on 1st July 1932. This in their Lordships' judgment is an impossible contention in view of the facts already detailed. It is true that had the shareholders affected by the resolution paid 5 per cent., their shares would not have been forfeited at that time. They would have been given a further opportunity of paying. But from those who had paid nothing, the directors may well have thought that nothing was likely to be obtained in the future. Their shares were accordingly then and there forfeited; they were forfeited however for non-payment of the 25 per cent. and not merely for non-payment of the 5 per cent.

This may seem to be somewhat technical; but in the matter of the forfeiture of

shares, technicalities must be strictly observed. And it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company. It will suffice to take the present case as an example. If the forfeitures are upheld the appellants remain liable, no doubt, for the whole 25 per cent. called up in March 1932 and in January 1933. But they will escape liability altogether in respect of the uncalled 25 per cent., and this is a matter that vitally affects the creditors. These creditors cannot be deprived of their right to have this 25 per cent. made available for payment of their debts without due cause.

The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the Articles of Association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due.

It was, however, strenuously contended on behalf of the appellants, both before the High Court and before their Lordships, that the forfeitures in question had been ratified by the whole body of creditors and shareholders. Such ratification, it was said, was to be implied from the fact that various balance sheets with reports thereon of the directors showing that the shares in question had been forfeited had been issued to the shareholders; that the forfeiture of the shares had also been mentioned and discussed at meetings both of creditors and shareholders; and that no creditor or shareholder had ever challenged the validity of the forfeitures.

In view, however, of the binding character of the scheme sanctioned by the Court, no variation of or departure from that scheme could be validated by the mere acquiescence of the shareholders and creditors, as has already been pointed out in an earlier part of their Lordships' judgment. But even if it be assumed that the forfeitures could be made valid by ratification, there is no evidence to which their Lordships' attention has been called to justify the conclusion that such ratification was in fact given. As was said by Lord Chelmsford in (1869) 3 H L 171[1] at p. 234:

> To render valid an act of the directors of a company which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz. the acquiescence of each and every member of the company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders.

By knowledge of the transaction Lord Chelmsford clearly meant knowledge of the invalidity of the transaction. Lord Cranworth in the same case said this (p. 194):

> Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular. . . .

Much to the same effect was said by Sir Barnes Peacock in delivering the judgment of this Board in (1877) 2 A C 366[2] at p. 375:

> Their Lordships think that it would be competent for a majority of the shareholders present . . . at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. In the present case there is nothing whatsoever to show that in the balance sheets or reports or at any meeting, the attention of the creditors or shareholders was called to any illegality or irregularity in the forfeitures of the shares, or that at any material time they had any knowledge of any such illegality or irregularity. Least of all were they told that they were being invited by their silence or otherwise to ratify the

1. Spackman v. Evans, (1869) 3 H L 171=37 L J Ch 752=19 L T 151.
2. Irvine v. Union Bank of Australia, (1877) 2 A C 366=46 L J P C 87=37 L T 176=25 W R 682.

forfeitures that had taken place. It was on these grounds that the plea of ratification was rejected, and in their Lordships' opinion was rightly rejected, by the learned Judges of the High Court.

A belated attempt was made by Mr. Pringle on behalf of some of the appellants to show that their shares had been forfeited not for default in payment of the calls of 25 per cent. made in March 1932 and January 1933, but, for default in payment of the calls of 50 per cent. made on the original allotment of the "A" and "B" shares. But no such contention was put forward in the High Court or in the printed case for the appellants. The contention is indeed in flat contradiction of some of the statements made in the case. In these circumstances it is far too late to advance any such contention now.

It only remains to mention one other matter. It is said by the appellants that the liquidator is attempting to charge them with interest on the unpaid calls and that the liability of the appellants as contributories is inconsistent with liability on them to pay such interest. Upon this question their Lordships express no opinion. The only question before them is whether the appellants have been rightly placed upon the list of contributories; and this question should, in their Lordships' judgment, be answered in the affirmative. What the result of this may be is a question that will have to be determined hereafter in the course of the liquidation. It does not arise on this occasion.

Their Lordships are of opinion for the reasons they have given that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
Cardew Smith & Ross.

A. I. R. 1938 Privy Council 290

(From Lahore : A I R 1936 Lah 72)

20th October 1938

LORDS WRIGHT, ROMER, PORTER AND SIR GEORGE LOWNDES AND SIR GEORGE RANKIN

Mohammad Ismail and others —
Appellants.

v.

Hanuman Parshad and another —
Respondents.

Privy Council Appeal No. 31 of 1937.

(a) Mahomedan Law — Wakf — Validity — Settlement of property by settlor on himself, his children and descendants with ultimate but remote remainder to charity — Settlor's object only to save property from creditors — Wakf held not valid.

To a demand by the mortgagee for the mortgage amount, the mortgagor made no reply but soon after proceeded to make dispositions of practically the whole of his other properties by way of sale for a nominal consideration to a relation of his wife, a gift to his wife's sister and a wakf purporting to settle other property upon himself and his children and their descendants, with an ultimate, but somewhat remote, remainder to charity. The provisions of the wakf left the settlor in full control of the income for his life, and made the entire profits after his death divisible among his heirs according to Mahomedan law. It was doubtful whether the value of the mortgaged property was sufficient to cover the debt and no evidence in support of the bona fides of the wakf was given:

Held that the settlor's object was only to save his other property from the creditor and as such the wakf was not valid. [P 291 C 2]

(b) Civil P. C. (1908), O. 21, R. 63—Onus.

Where the facts are fully established and the inference from them is clear, the question of onus is not material. [P 291 C 2 ; P 292 C 1]

C. Sidney Smith—*for Appellants.*

J. M Parikh—*for Respondent No. 1.*

Sir George Lowndes.—For the purpose of this judgment the facts may be stated quite shortly. In the main they are not in dispute. One Mahomad Sadiq, the father of the appellants, was (prior to the transactions hereinafter referred to) the owner of various immovable properties in Delhi. On 27th February 1922, he mortgaged a two-thirds share in a number of small buildings in the city to Chuni Lal, the father of the respondent, for Rs. 25,000. No payments having been made by the mortgagor Chuni Lal on 5th March 1926 served a notice on him demanding payment of the mortgage debt within 10 days. No reply appears to have been made to this demand, but the mortgagor thereupon proceeded to make dispositions of practically the whole of his other properties. On 23rd March he executed a deed of sale in favour of a relation of his wife for a nominal consideration of Rs. 1500. On 29th April following he executed : (1) a deed of gift of another house valued at Rs. 15,000 in favour of his wife's sister, and (2) a wakf-alal-aulad purporting to settle other property of the value of about Rs. 12,000 upon himself and his children and their descendants, with an ultimate, but somewhat remote, remainder to charity. It is the validity of this wakf that is in dispute in the present appeal.

On 9th August 1926, Chuni Lal instituted a suit on his mortgage, claiming Rupees 41,968 for principal and interest to that date. A preliminary decree in the usual form was passed on 28th March 1927, and a final decree on 28th April of the same year. The mortgaged property was brought to sale in due course and eventually fetched only Rs. 14,000 leaving a large deficit for which the mortgagee in July 1928 obtained a personal decree against Mahomad Sadiq. In execution the mortgagee attached all the alienated properties including those comprised in the wakf. The transferees objected and applied to raise the attachments, but their objections were in each case disallowed, the Court holding the transactions to be fraudulent. Suits were then instituted by the claimants under O. 21, R. 63, Civil P. C., which were all eventually dismissed by the High Court at Lahore. In one of them, that concerning the wakf, an appeal has been brought to His Majesty in Council, the appellants being the sons and daughters of Mahomad Sadiq now deceased. Chuni Lal also died during the proceedings in India, and is now represented by his son, the respondent.

The wakf suit, out of which the appeal arises, was heard by the Additional Subordinate Judge of Delhi who delivered his judgment on 31st October 1930. He held that the wakf was valid, and passed a decree in favour of the appellants. His conclusion was that at the time the wakf was executed the value of the mortgaged property was amply sufficient to cover the mortgagee's claim. In arriving at this conclusion, he relied mainly on the fact that in certain interlocutory proceedings in the mortgage suit the property had been valued by a commissioner appointed by the Court at over Rs. 50,000, a sum which would admittedly have sufficed to discharge the mortgage debt in full. The appeal to the High Court was heard by Coldstream and Jai Lal JJ. The judgment of the Court was delivered by the latter, his learned colleague concurring.

The learned Judges did not place much reliance on the valuation above referred to, and their Lordships agree that it was perfunctory. The judgment says that it was established on the record, and was indeed a matter of common knowledge, that between 1921, when Mahomad Sadiq bought the mortgaged property, and 1928, when the execution sale took place, the value of properties in Delhi was falling, and this was not disputed by the appellants' counsel. The learned Judges took the auction price of Rs. 14,000 as the best proof of its then value, and this was confirmed by the fact that an offer was made by another party to buy the property for Rs. 15,000 which the mortgagor was willing to accept, but the would-be purchaser backed out. They thought that the provisions of the wakf, which left the settlor in full control of the income for his life, and made the entire profits after his death divisible among his heirs according to Mahomedan law, taken in conjunction with the dates of: (1) the mortgagee's demand for payment, (2) the alienations of the other properties, and (3) the execution of the wakfnama, clearly showed that the settlor's object was only to save his other property from the creditor. It was also, they thought, significant that he did not give evidence in support of the bona fides of the wakf. In their Lordships' opinion these considerations were of undoubted weight and properly led to the conclusion at which the learned Judges arrived, and with which their Lordships concur.

The real question is what was in the mind of Mahomad Sadiq at the time he made these dispositions of his property. The valuation upon which so much reliance is placed by the appellants had not, of course, then materialized, and he must, their Lordships think, have known that it was at least doubtful whether the value of the mortgaged property was sufficient to cover the debt. The nature of the dispositions made by him and the fact that he was not prepared to go into the witness-box to explain them, or to controvert the almost obvious implication of what he had done, lead inevitably, in their Lordships' opinion, to the conclusion at which the learned Judges of the High Court arrived.

A good deal of argument was addressed to the question of burden of proof. Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O. 21, R. 63 of the Code, to put the onus of proving the bona fides of any transaction upon which the objector relies upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material. In the present case where the facts are fully established, and the inference from them is clear, their

Lordships think that nothing would be gained by any examination of the authorities to which reference has been made before them. For the reasons given above, their Lordships will humbly advise His Majesty that this appeal should be dismissed, and that the costs should be paid by the appellants.

K.S./R.K. *Appeal dismissed.*

Solicitors for Appellants—
Hy. S. L. Polak & Co.

Solicitors for Respondent No. 1—
T. L. Wilson & Co.

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* A. I. R. 1938 Privy Council 292

(From Lahore: A I R 1933 Lah 841)

21st October 1938

LORDS WRIGHT, ROMER, PORTER AND SIR SHADI LAL AND SIR GEORGE RANKIN

Firm Gokal Chand-Jagan Nath —
Appellants.

v.

Firm Nand Ram Das-Atma Ram —
Respondents.

Privy Council Appeal No. 133 of 1936.

*** (a) Principal and Agent—Duty of agent collecting outstandings for principal is to do his best to collect all he can—Debtor in financial difficulty—Agent collecting all cash he can and giving credit for rest — Bankruptcy of debtor—Onus is on principal to show agent could realize more cash, before he can be held liable.**

The duty of a commission agent, collecting outstandings on behalf of the principal and paying them over, in a case where the third party debtor to the principal, is financially embarrassed is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance. [P 293 C 2]

No doubt an agent's authority is at least presumptively to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. But where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay, there is no question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty and that the plaintiff has suffered damage which he can only do by showing that the agent could have realized more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage: *(1897) 1 Ch 171; (1894) 1 Q B 272 and (1866) 1 Q B 352, Ref.; (1742-74) 2 Wils K B 325, Rel. on.* [P 294 C 1]

(b) Civil P. C. (1908), O. 41, R. 31, Ss. 99 and 108—Judge after giving judgment going on leave without signing it—Defect is a mere irregularity not affecting merits.

Rule 31 of O. 41 does not say that if its requirements are not complied with, the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed, the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court and is no ground for setting aside the decree. [P 295 C 1]

C. S. Rewcastle and Dingle Foot — *for Appellants.*

S. P. Khambatta — *for Respondents.*

Lord Wright. — The appellants are a firm of merchants carrying on business at Sialkot. The respondents are a firm of commission agents in Calcutta, who, from between 1919 and 1922, were employed by the appellants to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags. The question in this appeal relates to three transactions executed by the respondents on behalf of the appellants in accordance with this course of business. These transactions were duly closed by the respondents with the other parties, and in the result three sums of money were respectively due on the balance of the transactions: from Diwan Chand-Amar Chand Rs. 1275, from Chatter Bhuj Dossa Rs. 8670, from Kalu Ram Kanhaya Lal Rs. 510. This was the position when the transactions were closed in October 1920. But the three parties were in financial difficulties and in the result the respondents succeeded in obtaining payment of a part only of this indebtedness. This action was brought to recover from the respondents the differences between the sums due from the third parties and the sums of indebtedness set out above. The largest debtor was the firm of Chatter Bhuj Dossa, from whom in the result when the firm became insolvent in May 1922, there was still a considerable sum outstanding.

The respondents had taken hundis on account in March 1921, and renewals in October 1921, but no cash payment had been obtained save Rs. 764-15-3. The hundis which were taken were in the respondents' favour and included sums other than those due in respect of the transactions conducted for the appellants. The respondents as commission agents had in the ordinary course in each case conducted the transactions in their own name and taken a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between their different constituents, including the appellants. The appellants, for whom they had acted on that account, were not consulted before the hundis were taken, nor did they give any express authority to the respondents to accept hundis. The claim in the action was to recover the outstanding balance due to the appellants from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents. The course of business in regard to the other two firms was the same, save that in their cases the debts for the balance became ultimately time-barred.

The Subordinate Judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties, on the ground that the respondents as agents in giving credit to the third parties instead of recovering money from them,did so at their risk, especially if the third parties' financial position was shaky, and were therefore answerable to the appellants as their principals for the amounts of the debts ultimately not recovered. In other words, he held that the agent was liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. He also dealt with questions of interest and other matters of account. From this judgment appeal was taken to the High Court. That Court reversed the judgment of the Subordinate Judge, apart from questions of interest, to which reference will be made later.

The High Court were unable to accept the statement of principle which has been quoted above as the principle on which the Subordinate Judge proceeded. In their opinion, the true principle was that the duty which the respondents as agents owed to the appellants, their principals, was to exercise due care, skill and judgment in getting in what they could by making the best bargain possible under the circumstances. The Court held that in the present case it was for the appellants as plaintiffs to prove that the respondents as defendants had failed in that duty, and had been guilty of negligence, and that they had failed to do so. On the contrary the Court held on the evidence that it was established that the respondents did all that was reasonably possible and that it was no fault of theirs that the realizations were not larger than they were. They accordingly varied the judgment of the Subordinate Judge by reducing the decretal amount to Rs. 5919-8-3, which represented the money actually collected by the respondents in respect of the three debtors, together with interest from the date of the institution of the suit until payment at 6 per cent. per annum.

Their Lordships are in agreement with the High Court as to the principles to be applied. They have also considered the evidence in the case and are of opinion that the conclusions of fact arrived at by the High Court are fully justified. On the question of principle, their judgment is that the case in question depends on determining what is the duty of an agent in a case where the third party, debtor to the principal, is financially embarrassed. His duty then, in their judgment, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance. This is what the respondents did in this case. They recovered a substantial amount of the indebtedness and there is no evidence that they could have recovered more. The evidence is that they could not. The appellants' counsel have strenuously contended that the respondents are liable for the whole amounts eventually left outstanding on the ground that an agent is in general bound to receive cash in settlement of debts due to his principal, and has no right to give credit without express instructions from his principal, whereas in the present case the appellants gave no such instructions, and the respondents did not even ask for instructions until a later date after they had accepted the hundis.

On this point it is retorted that the appellants took no notice of this request

for instructions. But apart from that their Lordships are of opinion that the propositions relied on by the appellants are not applicable to a case like this. There are various authorities to the effect that an agent's authority is at least presumptively to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. Thus in (1897) 1 Ch 171[1] the question was whether a valid tender of mortgage money had been made; it was held that it had not, because it had been made by cheque, which was not a good tender. Again in (1866) 1 Q B 352[2] it was held that a purchaser at an auction sale could not claim that he had paid the purchase price as against the seller, when he had purported to do so by giving a bill of exchange to the auctioneer. That was no payment to discharge the purchaser as against the seller. Similarly, in (1894) 1 Q B 272[3] an agent was held liable for parting with a license against a cheque which was dishonoured, whereas he was only authorized to do so against cash. It is not necessary to multiply authorities on this point. But the position here is very different. This is a case where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay. There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty and that the plaintiff has suffered damage which he can only do by showing that the agent could have realized more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage. An old case, (1742-74) 2 Wils K B 325,[4] illustrates that principle. The defendant was an attorney who, by his negligence, had failed duly to charge a judgment-debtor in execution, so that he was released from the prison in which he was held in respect of the debt. It was decided that the defendant was not liable for the whole debt but only for such part of it as might have been realized by execution, because the action sounded only in damages. So in the present case the respondents did not become guarantors of the debts on the debtors' insolvency. They could only be made responsible for the debts to the extent that it could be established: (1) that they were negligent in seeking to realise them, and (2) that loss resulted to the appellants from that negligence. Their Lordships agree with the High Court that the appellants have failed on both points.

A subsidiary question was raised about the interest claimable on the sums actually received. The High Court awarded interest from the institution of the suit, whereas the appellants have claimed that they are entitled to interest from the date of the demand, which was 22nd July 1922, the date of the institution of the suit being 9th May 1923. The amount involved is trifling and no question of principle is involved on the facts of this case, which in their Lordships' judgment do not take the case out of the ordinary Common Law rule recently discussed by this Board in 65 I A 66.[5] Their Lordships will not repeat what was there said. In the present case no custom or contract to pay interest was proved, and further no reason has been shown for treating the debt as a debt in equity to which equitable rules as to recovery of interest can apply. In any case this question is not such as in the facts of the case to be a proper subject for invoking the appellate jurisdiction of this Board.

A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with O. 41, R. 31, Civil P. C. The relevant facts on this issue are that the hearing in the High Court was before two Judges, Harrison and Agha Haider JJ., and was actually delivered by the former Judge, the latter agreeing. The judgment was delivered on 22nd February 1933, but Harrison J. went on leave before signing the judgment, which was signed by Agha

1. Blumbers v. Life Interest & Reversionary Securities Corporation, (1897) 1 Ch 171=66 L J Ch 127=75 L T 627=45 W R 246.
2. Williams v. Evans, (1866) 1 Q B 352=35 L J Q B 111=13 L T 753=14 W R 330.
3. Pape v. Westacott, (1894) 1 Q B 272=9 R 55 =63 L J Q B 222=70 L T 18=42 W R 131.
4. Russell v. Palmer, (1742-74) 2 Wils K B 325 =95 E R 837.
5. Bengal-Nagpur Railway Co. v. Ruttanji Ramji, (1938) 25 A I R P C 67=173 I C 15=65 I A 66=I L R (1938) 2 Cal 72=32 S L R 374 (P C).

Haider J., the Deputy Registrar appending a note that Harrison J. had gone on leave before signing the judgment he delivered. O. 41, R. 31 requires that the judgment of the Appellate Court shall be in writing and shall state various matters, and "shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

The Rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the Rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The Rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by Ss. 99 and 108, Civil P. C. S. 99 provides that no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. That Section comes in the part dealing with appeals from original decrees. But S. 108 applies the same provision to appeals from appellate decrees and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment the defect here was an irregularity not affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree.

Various cases on similar irregularities which have come before the Courts in India have been cited. Their Lordships do not find anything in these authorities to affect their decision here. Their Lordships are of opinion that the appeal fails and should be dismissed with costs. They will humbly so advise His Majesty.

V.B.B./R.K. *Appeal dismissed.*

Solicitors for Appellants—Nehra & Co.

Solicitors for Respondents —
T. L. Wilson & Co.

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* A. I. R. 1938 Privy Council 295

(From Patna : A I R 1937 Patna 65)

31st October 1938

LORDS WRIGHT, ROMER AND PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

S. N. Bannerjee and another —
Appellants.

v.

Kuchwar Lime & Stone Co. Ltd. and others — Respondents.

Privy Council Appeal No. 82 of 1937: Patna Appeal No. 39 of 1936.

(a) Civil P. C. (1908), S. 109—Committal for finding of contempt for breach of injunction is not criminal in its nature—Leave to appeal under S. 109 granted to party inhibited by injunction is quite valid—Whether contempt committed by person abetting person actually inhibited is of criminal nature *(Quære).*

A committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code. Hence in such a case a certificate to appeal granted under S. 109 to person inhibited by such injunction is quite valid: *(1913) A C 417, Foll.* [P 298 C 2]

Quære— Whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal. [P 298 C 2]

(b) Contempt—Injunction against *B*—*A* abetting *B* in disobeying it—Petition to commit *A* for contempt for disobedience of injunction is wrong remedy—Petition should be to commit *A* for aiding *B* in his disobedience.

Where *A* aids and abets *B* in his disobedience of an injunction, it is a wrong remedy to petition the Court to issue notice upon *A* to show cause why he should not be committed for contempt for disobedience of the injunction. The petition should ask the Court that *A* be committed for aiding and abetting *B* in his disobedience. In the first case the Court might dismiss the application and ask the petitioner to apply again in proper form: *(1848) 11 Beav 180, Rel. on.* [P 298 C 2]

(c) Privy Council—Leave to appeal—Privy Council can give leave to appeal against orders of Courts overseas imposing penalties for contempt of Court—Discretionary power of the Board should be exercised with care.

It is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of Court. In such cases

however the discretionary power of the Board will no doubt be exercised with great care: *(1936) A C 322, Foll.* [P 298 C 2 ; P 299 C 1]

✲ **(d) Contempt—Disobedience of injunction —Injunction against Government not to interfere with possession of *A*—*B*, not party to injunction proceedings, interfering with *A*'s possession — *B* deriving his interest through Government—Government held not guilty of any disobedience of injunction—As Government was not liable for disobedience, *B*, deriving his interest through it, also was not liable :** *16 Pat 159=A I R 1937 Pat 65=166 I C 966 (S B), Reversed.*

The Government granted certain lease of quarrying rights to *A*. *A* took possession of the quarries. In a dispute concerning lease the Government and its servants were restrained by an injunction from disturbing possession of *A*. *B*, who was not a party to the injunction proceedings, but who derived his supposed interest from the Government, continued to work the quarries. *A* brought an action for contempt proceedings against the Government for disobedience of the injunction, and against *B*, for aiding and abetting the disobedience:

Held that Government could not be said to have disobeyed the injunction. It was for *A*, who had the immediate right to possession or was in possession under the order of the Court, and not for the Government, who was not in actual possession, to eject *B*. The duty of the Government was to leave those who claimed entitled to the possession of the soil to take the appropriate measures. [P 299 C 1, 2]

Held further, as Government was not liable, *B*, who derived his interest through it, could also not be held liable for disobedience: *16 Pat 159=A I R 1937 Pat 65=166 I C 966 (S B)*, **Reversed;** *(1882) 51 L J Ch 414 and (1897) 1 Ch 545, Disting.* [P 299 C 2 ; P 300 C 1]

J. M. Pringle and J. Millard Tucker and W. Wallach — *for Appellants.*

L. P. E. Pugh and T. T. R. McDonnell — *for Respondents.*

Lord Porter.—These are consolidated appeals from an order of the High Court of Judicature at Patna, dated 9th October 1936, made on the petition of the Kuchwar Lime and Stone Company (in liquidation), whereby it was ordered that (1) the Secretary of State for India in Council, (2) S. N. Ghose and (3) S. N. Bannerjee had been guilty of contempt and that the Secretary of State should forthwith pay to the petitioners one-half of their costs and that the other respondents should also pay to the petitioners one-half of their costs and should be jointly and severally liable therefor. Of these persons S. N. Ghose is the managing director of a Company called the Kalyanpore Lime Works, Ltd. and S. N. Bannerjee then manager of that Company. The reason for the petition is to be found in the previous acts and relationship of the parties. On 1st April 1928, the Secretary of State granted to the petitioners two leases: one of the mineral rights in Lower Murli Hill and the other of the surface and mineral rights in Upper Murli Hill for a period of 20 years. The leases contained stipulations against assignments or the transfer of any right or interest thereunder without the previous assent of the Board of Revenue of Bihar and Orissa, and provided that a breach of those stipulations should entail a right of forfeiture by the Government. On 23rd September 1928 the respondents purchased the surface rights in Lower Murli Hill from the local zamindar.

In January 1933 the respondents went into voluntary liquidation and on 30th September of that year entered into a written agreement with one S. G. Bose for the sale to him of their right under the two leases. On 6th October the respondents who had acquired the surface rights in Lower Murli Hill, sold those rights to Bose and on 9th October 1933 applied to the Collector of Shahabad for permission to assign the lease to him. On the same day Bose started quarrying operations. On 6th December 1933, the sub-divisional officer of Sasaram, acting under the instructions of his superiors, refused permission to assign and directed Bose to stop work. On 20th April 1934, the Commissioner of the Division informed the respondents' solicitors that the Government had by order dated 27th March 1934, forfeited the leases and the Government formally confirmed the forfeiture on 18th July 1934.

Meanwhile S. N. Ghose, as managing director of the Kalyanpur Lime Works, Ltd., having heard that the leases were being terminated, wrote to the Collector of Shahabad offering, on behalf of his company, to take leases of the properties. By letter dated 31st March 1934, from the Secretary to the Board of Revenue to the Commissioner, a copy of which was forwarded to S. N. Bannerjee as manager of that Company, the offer was accepted. On receiving the copy of this letter, the Kalyanpur Company took possession of the quarries in April 1934, and this action was approved by the Collector in a letter dated 13th May 1934, in which he stated that "having been granted a lease of lime stone concession in the Upper and Lower Murli areas you are lawfully entitled to start work on them at once." On 21st April 1934, S. N. Bannerjee informed the respondents that the Board of Revenue had sanctioned the leases to the Kalyanpur Company.

Certain disputes arose between that Company and Bose as to rights of ingress to and egress from the quarries but the Company continued to work the quarries until 20th May 1935, when they temporarily suspended operations. The events which led up to this suspension were as follows: On 24th September 1934, the respondents brought a suit in the Court of the Subordinate Judge of Arrah against the Secretary of State for a declaration that their leases had not been validly forfeited and for an injunction to restrain the Secretary, his servants and agents, from granting leases to the Kalyanpur Company or to others and from authorizing such person or persons to carry on operations in the Murli Hills and from otherwise interfering with any of the rights of the respondents in respect of the said hills. The Secretary of State in his defence contended that he had rightly terminated the leases, ejected the respondents and authorized the Kalyanpur Company to enter and work the quarries. The Subordinate Judge dismissed the suit on 7th March 1935. The respondents thereupon appealed to the High Court and on 25th April 1935 ex parte obtained an interim injunction against the Secretary of State in the terms set out above. S. N. Bannerjee received a copy of this injunction on 20th May 1935, and work was stopped the next day.

On 7th February 1936 the High Court allowed the appeal, held that the two leases had not been validly forfeited and ordered that there should be an injunction restraining the defendant and his servants from interfering with the respondents' leases on the basis of the forfeiture claimed by him in the Government notification of 18th July 1933. From that judgment, the Secretary of State appealed to this Board and judgment dismissing his appeal was given on 19th November 1937. There is no doubt but that all the appellants were from the date of its pronouncement, aware of the granting of the injunction and its terms. The Kalyanpur Company asserted that they stopped work not because of the injunction, which they contended was not binding upon them, but because the Government had given them an executive order to do so, but the Government never accepted this position. Acting however on the contention that they were not bound by the injunction, the Kalyanpur Company resumed quarrying operations on 2nd March 1936, and on the next day informed the Chief Inspector of Mines and the Collector that they had done so. The Collector replied on 16th March 1936 that they were taking this course at their own risk.

On 9th March the respondents' solicitors, having been informed that the Kalyanpur Company had again begun work at the quarries wrote to the Collector pointing out that judgment had been given in their clients' favour by the High Court and requesting that immediate instructions be given prohibiting the Kalyanpur Company from continuing to carry out any operations on the mines and for the restoration of possession to Mr. Bose, the respondents' agent. On 18th March, by letter sent to the Collector to the Commissioner of the Patna Division and to the Chief Secretary to the Government of Bihar and Orissa, the solicitors repeated their protest, stated that the failure to take any steps to prevent the trespass appeared to them to constitute a contempt of Court and added that they would move the Court unless steps were taken by the Government to prevent the Kalyanpur Company from further trespass. After receiving a reply stating that the matter was being considered, they wrote again on 28th March asking what steps had been taken to stop the working in the mines by the Kalyanpur Company. This letter crossed one from the Collector of the same date, which may be set out in full since it forms the basis of the complaint against the Secretary of State in the present proceedings :

GENTLEMEN,

With reference to your letter number M/N-7463, dated 18th March 1936, I have the honour to say that on the authority of letter number 21-27-4. dated 31st March 1934, issued by the Board of Revenue of Bihar and Orissa, possession of the quarries at the Murli Hill was delivered to Messrs The Kalyanpur Lime Works, Limited, on 15th April 1934. That company took possession of the quarry on that date and they have been working in it since 15th May 1934. Messrs. The Kalyanpur Lime Works, Limited, were not parties to the suit which was brought against Government by the liquidators of the Kuchwar Lime and Stone Company, Limited, and the decree passed by the High Court does not give Government authority to eject their present lessees. You may take such legal action against Messrs The Kalyanpur Lime Works, Limited, as you are advised.

I have the honour to be,
Sir,
Your most obedient servant,
R. A. E. WILLIAMS,
Collector of Shahabad, 28-3-36.

On receipt of this letter the respondents petitioned the High Court at Patna to

commit all the appellants for contempt in disobeying the injunction of that Court. By order of 19th November 1936, the High Court allowed the application, declared the three appellants guilty of contempt and made the order as to costs hereinbefore set out. The substantial ground on which the High Court came to its conclusion was (a) that by their letter of 28th March 1936, the Government had made up their minds to depart from the correct attitude of the Collector and had decided to come out into the open and support the cause of the Kalyanpur Company ; (b) that the Kalyanpur Company were treated by the Government as lessees and the Government would support their supposed lessees in that attitude and (c) that by some means or other the Kalyanpur Company had persuaded the higher authorities in the Government hierarchy to support their possession. The High Court accordingly held the Government in contempt by direct breach of the injunction by allowing Bannerjee and Ghose to work the quarries, and by encouraging them by their support.

As to the other two appellants, admittedly they were the executive authority of the Kalyanpur Company and as such responsible for its actions. The High Court therefore on the authority of (1897) 1 Ch 545,[1] held that as they were aware of the injunction, their presence upon the quarries with the permission of the Government was a setting at naught of the order of the Court and therefore a contempt. S. N. Ghose and S. N. Bannerjee obtained a certificate that the case was fit for appeal under S. 109 (c) of Act 5 of 1908 on 20th April 1937, and on the same date the Secretary of State obtained a like certificate under the same Section. The appeals were afterwards admitted under O. 45, Civil P. C. Later, the appeals were consolidated and were heard by the Board as consolidated appeals. A preliminary objection to their hearing was made by the respondents on the ground that the contempt in both cases or at any rate in the case of Ghose and Bannerjee was of the nature of a criminal matter, that the leave granted was granted under the Civil Procedure Code and inasmuch as it was in the wrong form this Board should hold on the authority of 28 I A 182,[2] that leave had not properly been given. The objection is purely technical and so far as the Secretary of State is concerned, their Lordships think it now sufficiently established that a committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code: *see* (1913) A C 417[3] at p. 456.

The question whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal has given rise to much controversy, controversy which in the present case this Board does not think it necessary to resolve. The respondents themselves when petitioning the Court asked the Court to issue notice upon the opposite parties to show cause why they should not be committed for contempt for disobedience of the injunction. Strictly speaking this was a wrong remedy to ask against Ghose and Banerjee. The injunction was not binding on them and they had never disobeyed it. The petition should have asked that they be committed for aiding and abetting the Secretary of State in his disobedience. Indeed on the authority of (1848) 11 Beav 180 and 181,[4] the High Court might well have dismissed the petition against those two appellants and left the petitioners to apply again in proper form. Though the High Court did not do so but treated the petition as if application had been made to commit those appellants for contempt in aiding and abetting the Secretary of State, yet their Lordships do not think, the respondents have any cause of complaint if the Court in admitting the appeal treated the case (as the respondents themselves had done) as being a petition for breach of the injunction and gave a certificate as in a civil matter.

It was further argued that in any case leave to appeal should not have been granted and an appeal should not be admitted in cases where penalties have been imposed for contempt. That very question has however lately been before their Lordships in (1936) A C 322[5] at p. 329 where Lord Atkin gave it as the clear opinion of the Court that it is competent to His Majesty in Council to give leave to appeal

1. Seaward v. Paterson, (1897) 1 Ch 545=66 L J Ch 267=76 L T 215=45 W R 610.
2. Radha Krishna Das v. Rai Krishna Chand, (1901) 23 All 415=28 I A 182 (P C).
3. Scott v. Scott, (1913) A C 417=82 L J P 75.
4. Wellesley v. Earl of Mornington, (1848) 11 Beav 180 and 181=12 Jur 367=50 E R 785.
5. Ambard v. A. G. for Trinidad, (1936) A C 322.

and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of Court. In such cases however the discretionary power of the Board will no doubt be exercised with great care. Such interferences when they amount to contempt are quasi criminal acts and orders punishing them should, generally speaking, be treated as orders in criminal cases. The learned and noble Lord was then speaking of contempt in criticizing the action of a Court and not of contempt in disobeying an injunction or in aiding and abetting such disobedience but whether or no the rules laid down by Lord Atkin apply to this case, their Lordships are of opinion that on the material before them leave was rightly granted.

As to the substantive question of the appeal, their Lordships do not find themselves in agreement with the view of the High Court. So far as the Secretary of State for India is concerned, the ground on which liability was imposed was that he and his subordinates had in March 1936 supported and endorsed the action of the Kalyanpur Company in either continuing in or taking possession of the quarries at Upper and Lower Murli. In coming to this conclusion the High Court made it plain that they were influenced, and influenced solely by the Collector's letter of 28th March 1936. In argument before the Board the Secretary of State reserved the question whether the proceedings were properly framed against him, firstly because he was sued in his public capacity as Secretary of State in Council and therefore as a body corporate against whom sequestration might be invoked but no order for contempt could be made, and secondly because in any case he could not be made responsible in contempt for the action of his officials in India.

He was however prepared to assume for the purpose of the argument that in a proper case proceedings for contempt could be taken against him. Making this assumption however he contended that no evidence of disobedience to the injunction or of contempt for the order of the Court had been shown. With this contention their Lordships agree. It is true that the reversion of the surface and mining rights in Upper Murli and of the mining rights in Lower Murli belonged to the Government. But the surface of Lower Murli belonged to Mr. Bose and the immediate right to possession of the surface of Upper Murli and of the minerals in both belonged to the respondents. It was for the respondents who either had the immediate right to possession or were in possession under the order of the Court and not for the Government who were not in possession to eject the Kalyanpur Company, if ejection was to be effected. Indeed the respondents might at any time have made that Company defendants in the original action. The Government was under no duty to act; their duty was to leave those who claimed to be entitled to possession of the soil to take the appropriate measures.

But it is said the Government did act in a manner hostile to the respondents in that they incited the Kalyanpur Company to take or retain possession in defiance of the order of the Court. Their Lordships can see no evidence of this either in the letters or in the circumstances of the case. In the first place it is to be noticed that the letter of 28th March is not written to the Kalyanpur Company, but to the solicitors to the respondents and there is nothing to show that it ever reached the eyes of Ghose or Bannerjee. But even if it had done so in their Lordships' view there is nothing in the letter itself to indicate that the Government were supporting the Kalyanpur Company. The letter is a statement of fact necessitated by the communication to which it was a reply and sets out the considerations which weighed with the Government in deciding to take no action. Their Lordships see no ground for suspecting the motives of the Government officials, much less evidence of a breach of the injunction. The respondents however contended that even if the Secretary of State was not himself guilty of direct disobedience to the injunction which had been granted, yet the other two appellants were guilty of contempt upon the principles set out in (1882) 51 L J Ch 414[6] and (1897) 1 Ch 545.[1] In terms however, those cases limit the offence of contempt by a person not a party to the injunction to cases where they aid and abet the party enjoined in its breach. Where, as here, that party has not broken the injunction it is impossible to hold that anyone has aided or abetted them in breaking it.

The respondents sought to avoid this difficulty by maintaining that the doing by anyone of an act which was forbidden by

6. Avery v. Andrews, (1882) 51 L J Ch 414=46 L T 279=30 W R 564.

the injunction was itself an offence. Their Lordships can find no authority for so wide a proposition. It is certainly not enunciated or indeed hinted at in the cases referred to, nor do they think it is sound in principle. The actual wording of the injunction in the present case is "to restrain the defendant and his servants from interfering with the plaintiffs' lease." Ghose and Bannerjee are not the servants of the Secretary of State and therefore did not do anything forbidden by the injunction. The utmost which the respondents could say was that the Kalyanpur Company, having derived their supposed interest from the Secretary of State, who had been forbidden to interfere with the respondents' lease, were acting against the spirit if not the letter of the injunction in taking or continuing in possession of the quarries, and were therefore guilty of contempt in interfering with the respondents' lease. The fact however that Ghose and Bannerjee claimed on behalf of their Company to derive title, rightly or wrongly (and their Lordships will assume wrongly), through the Secretary of State, cannot in their view make them liable for an act not forbidden to them though forbidden to him. The question of the Kalyanpur Company's right to possession, if it is to be tested, must be fought out on an issue properly framed against that Company.

In their Lordships' view Ghose and Bannerjee could only be held liable for contempt if they had aided and abetted the Secretary of State in breaking the injunction, and as has been explained above that liability must fail if the petition against the Secretary of State fails. Though the appeals were consolidated, the two questions were in their Lordships' view distinct and it was proper that the first two appellants should be separately represented. Their Lordships will therefore humbly advise His Majesty that both appeals should be allowed, and the order declaring the appellants guilty of contempt and ordering them to pay costs should be discharged and the respondents ordered to pay the costs of both sets of appellants before the Board and in the Courts below.

V.B.B./R.K. *Appeals allowed.*

Solicitors for Appellants —
Hy. S. L. Polak & Co.

Solicitors for Respondents —
Sanderson, Lee & Co.

E N D

THE

ALL INDIA REPORTER

1938

Federal Court of India

*** * A. I. R. 1938 Federal Court 1**

(From Patna)

11th October 1938

GWYER C. J., SULAIMAN AND JAYAKAR JJ.

Pashupati Bharti — Applicant.

v.

Secretary of State and another — Opposite Party.

Revision Appln. No. 2 of 1938.

*** (a) Government of India Act (1935), S. 205 (1)—Certificate of High Court is condition precedent to exercise of jurisdiction by Federal Court — If certificate is given, appellant is not restricted to constitutional issue.**

The certificate of the High Court that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is a condition precedent to the exercise of jurisdiction by the Federal Court, although if the certificate has once been given, the case is at large and the appellant is not necessarily restricted in arguing his appeal to what may be called the constitutional issue. But until the certificate has been granted, the Federal Court cannot entertain the case at all. [P 2 C 2]

*** (b) Government of India Act (1935), S. 205 (2) — Litigant's right to appeal to Privy Council is not lost by refusal of High Court to grant certificate.**

A litigant who, apart from S. 205, would have a right of appeal to the Privy Council, is not deprived of that right by the refusal of the High Court to grant a certificate. Sec. 205 (2) only applies where a certificate is given and has no application to a case where it has been refused.

[P 2 C 2]

(c) Government of India Act (1935), S. 224 — High Court has no inherent powers of revision apart from statutory provisions.

Outside the statutory provisions, e. g. Sec. 224, Government of India Act and S. 115, Civil P. C., no High Court has any inherent powers of revision over the Subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself. [P 3 C 1]

*** * (d) Government of India Act (1935), Sec. 205 (1) — High Court refusing to grant certificate — Federal Court has no jurisdiction to entertain application for revision of such order.**

Though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes, there is no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts.

[P 2 C 2; P 3 C 1]

The concluding words of Sec. 205 (1), which impose a duty on every High Court to consider in each case whether or not a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder is involved, "and of its own motion to give or to withhold a certificate accordingly," may reasonably be construed as giving the High Court the last word in the matter, so far as this Section is concerned; and as there is no statutory powers of revision or superintendence possessed by the Federal Court like those possessed by the High Court under S. 224, Government of India Act or Sec. 115, Civil P. C., the Federal Court cannot entertain in exercise of its inherent power, an application for revision of an order of a High Court refusing to grant a certificate under S. 205 (1): *15 All 84, Disting.*

[P 2 C 1; P 3 C 2]

(e) Government of India Act (1935), Sec. 205 (1)—Cause of action arising before Act of 1935 and judgment founded on provisions of earlier Act—Such provisions re-enacted in Act of 1935 — No question of law as to interpretation of Act of 1935 arises.

It cannot be said that since S. 240 of the Act of 1935 had re-enacted with amendments S. 96-B of the earlier Act (on which the appellant's cause of action was based) the Act of 1935 must pro tanto be regarded as retrospective, so that a Court which had founded its judgment on the provisions of S. 96-B must in law be deemed to have been interpreting the provisions of S. 240 of the Act of 1935.

[P 3 C 2]

Order.—This is an ex parte application for revision of an order passed by the

Patna High Court rejecting a petition for the grant of a certificate under S. 205 (1), Government of India Act, 1935. There was also an application for revision of an order of the High Court dismissing an appeal by the applicant from a judgment of the Subordinate Judge, on the ground that the applicant had failed to pay the court-fees which he had been ordered to pay after the rejection of an application to be allowed to prosecute his appeal in forma pauperis. Counsel for the applicant informed us however that he did not propose to proceed with the application for revision of the last mentioned order. It appears that the applicant was formerly a guard on the East Indian Railway and that he was dismissed from his employment at some time early in 1933. In August 1935, he instituted a suit in the Court of the Subordinate Judge (Third Court), Patna, for a declaration that his dismissal was wrongful and illegal and for damages and compensation, and was allowed to prosecute this suit in forma pauperis. In July 1937, judgment was given against him on the ground that his suit was not maintainable, and the applicant thereupon appealed to the High Court at Patna, asking at the same time that he might be allowed to prosecute his appeal in forma pauperis. The latter application was rejected and he was ordered to pay the full court-fees. He did not comply with the order and his appeal was accordingly dismissed on 22nd November 1937. On 20th January 1938 he filed an application before the High Court for a certificate under Sec. 205 (1), Government of India Act 1935. On 27th January the application was summarily rejected by the High Court; and it is against that rejection that the applicant now seeks the assistance of this Court.

A formidable difficulty confronts the applicant in limine; for, he has to satisfy us that this Court has jurisdiction to entertain an application for revision of the order of a High Court refusing to grant a certificate under Sec. 205 (1) of the Act of 1935. In our opinion this Court has no such jurisdiction. Sec. 205 (1) provides that an appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder; and by sub.s. (2), where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and, with the leave of the Federal Court, on any other ground. Thus, the certificate of the High Court that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is a condition precedent to the exercise of jurisdiction by the Federal Court, although if the certificate has once been given, the case is at large and the appellant is not necessarily restricted in arguing his appeal to what may be called the constitutional issue. But, until the certificate has been granted, the Federal Court cannot entertain the case at all. Counsel for the applicant admitted that no right of appeal against the refusal to grant a certificate is given by Sec. 205; and he could not well do otherwise. But he contended that a right to ask for revision of such a refusal could and ought to be collected from the provisions of the Section; further, and in the alternative, he submitted that the Court has an inherent power to exercise a revisional jurisdiction for the purpose of preventing injustice.

On the first point counsel for the applicant argued that, inasmuch as an appeal to the Privy Council is now barred under S. 205 (2), the Federal Court must necessarily possess the power to interfere, if a High Court refuses to grant a certificate under S. 205 (1); since otherwise, a litigant would find himself debarred from access both to the Privy Council and to this Court and would therefore be left with no remedy at all. In support of this argument counsel relied upon the concluding words of Section 205 (2). So far as access to the Privy Council is concerned, this argument is obviously based upon a misapprehension. A litigant who, apart from Sec. 205, would have a right of appeal to the Privy Council, is not deprived of that right by the refusal of the High Court to grant a certificate. S. 205 (2) only applies where a certificate is given and has no application to a case where it has been refused. To the second point, viz. that the inherent powers of the Court must be held to give it a revisional jurisdiction for the purpose of preventing injustice, there appear to us to be several answers. In the first place, though every Court of superior jurisdiction no doubt

possesses inherent powers for certain purposes, (of which it is unnecessary, and perhaps would be unwise, to attempt an exhaustive definition), we know of no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts. The observations of Edge C. J. in 15 All 84[1] at page 95, which were cited to us, had reference to the domestic procedure of the Court and are quite irrelevant in the present connexion. Nor is any support for the theory of an inherent power to be found in the analogy of the revisional and supervisory jurisdiction of the High Courts in British India. That jurisdiction is entirely a creature of statute, e. g. S. 224 of the Act of 1935 and S. 115, Civil P. C. Outside the statutory provisions no High Court has any inherent powers of revision over the Subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself; and if there have been during recent years tentative efforts on the part of one or two High Courts to assert such powers, they have now been decisively negatived by sub-s. (2) of S. 224 of the Act of 1935.

It is not possible to point to any statutory powers of revision or superintendence possessed by this Court like those possessed by the High Courts under the Sections to which we have referred; and the relation between this Court and the High Courts of British India bears no resemblance to the relation between the High Courts and Courts subordinate to them. Lastly, the concluding words of Section 205(1), which impose a duty on every High Court to consider in each case whether or not a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder is involved, "and of its own motion to give or to withhold a certificate accordingly," may reasonably be construed as giving the High Court the last word in the matter, so far as this Section is concerned; and it is unnecessary to consider whether Parliament omitted to give an appeal against the refusal of a certificate because it overlooked the point, or because (what seems equally possible) it trusted the High Courts to act with reasonableness and impartiality. We have one other observation to make. It is clear from the facts stated above that the questions of law, if any, involved in the applicant's case could not in any circumstances be concerned with the interpretation of the Act of 1935 or any Order in Council made thereunder, since his original cause of action, if he ever had one, arose as long ago as 1933, some four years before the Act of 1935 came into force. This would of itself be sufficient to dispose of the whole matter, for, we cannot take seriously the fantastic argument advanced on behalf of the applicant that since Sec. 240 of the Act of 1935 had re-enacted with amendments S. 96-B of the earlier Act (on which his alleged cause of action was based), the Act of 1935 must pro tanto be regarded as retrospective, so that a Court which had founded its judgment on the provisions of Sec. 96-B must in law be deemed to have been interpreting the provisions of S. 240 of the Act of 1935. We have little doubt that it was because it was plain on the face of the record that the applicant's cause of action arose before the Act of 1935 ever became law that the High Court were content to dismiss summarily his application for a certificate and did not think it necessary to give any formal statement of their reasons for doing so, which in an ordinary case they would no doubt agree to be the more appropriate course to adopt. The application must be dismissed.

K.S./R.K. *Application dismissed.*

1. Dhonkal Singh v. Phakkar Singh, (1893) 15 All 84=1893 A W N 36 (F B).

END

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THE
ALL INDIA REPORTER
1938

Imperial Acts Section

ACT NO. XXIX OF 1937.

Indian Mines (Amendment) Act, 1937

[Received G. G.'s assent on 3rd December, 1937.]

An Act further to amend the Indian Mines Act, 1923, for certain purposes.

WHEREAS it is expedient further to amend the Indian Mines Act, 4 of 1923, for the purposes hereinafter appearing; It is hereby enacted as follows :

Short title.

1. This Act may be called the Indian Mines (Amendment) Act, 1937.

Amendment of section 2, Act 11 of 1936.

2. In section 2 of the Indian Mines (Amendment) Act, 11 of 1936,—

(*a*) in sub-section (*1*), for the words "the following sub-section shall be deemed to be inserted" the words "the following sub-section shall be inserted" shall be substituted and

(*b*) sub-section (*2*) shall be omitted.

Amendment of section 9, Act 4 of 1923.

3. In section 9 of the Indian Mines Act, 4 of 1923 (hereinafter referred to as the said Act),—

(*a*) to sub-section (*1*) the following words shall be added, namely:—

"and shall not be disclosed to any person other than a Magistrate or an official superior or the owner, agent or manager of the mine concerned, unless the Chief Inspector or the Inspector considers disclosure necessary to ensure the safety of any persons";

(*b*) in sub-section (*2*), for the words "to any one, other than a Magistrate or an officer to whom he is subordinate" the following words shall be substituted, namely :

"contrary to the provisions of sub-section (*1*);"

(*c*) in sub-section (*3*), for the words following the words "under this section" the following words shall be substituted, namely,—

"except with the previous sanction of the Central Government."

Notes.—Sub-section 1 of the Act of 1923, merely mentioned that the information should be regarded as confidential. The amendment explains under what circumstances and to whom it can be disclosed. Under sub-section (3) as amended an offence under section 9 can be tried only with the previous sanction of the Central Government no matter by whom the complaint is made.

Amendment of section 30-A, Act 4 of 1923.

4. In section 30-A of the said Act, for the word "regulations" the word "rules" shall be substituted, and for clauses (*a*), (*b*), (*c*) and (*d*) the following clauses shall be substituted, namely :—

"(*a*) requiring the establishment of central rescue stations for groups of specified mines or for all mines in a specified area, and prescribing how and by whom such stations shall be established;

(*b*) providing for the management of central rescue stations, and regulating the constitution, power and functions of, and the conduct of business by, the authorities (which shall include representatives of the owners and managers of, and of the miners employed in, the mines or groups

of mines concerned) charged with such management;

(*c*) prescribing the position, equipment, control, maintenance and functions of central rescue stations;

(*d*) providing for the levy and collection of a duty of excise (at a rate not exceeding six pies per ton) on coke and coal produced in and despatched from mines specified under clause (*a*) in any group or included under clause (*a*) in any specified area, the utilisation of the proceeds thereof for the creation of a central rescue station fund for such group or area and the administration of such funds;

(*e*) providing for the formation, training composition, and duties of rescue brigades; and

(*f*) providing generally for the conduct of rescue work in mines."

Amendment of section 31, Act 4 of 1923.

5. In sub-section (*1*) of section 31 of the said Act, for the word and figure "and 30" the figures and word "30 and 30-A" shall be substituted.

ACT NO. I OF 1938.

The Repealing Act, 1938

[Received G. G's. assent on 26th February 1938.]

An Act to repeal certain enactments.

WHEREAS it is expedient that the enactments specified in the Schedule which are spent or have otherwise become unnecessary or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed ; It is hereby enacted as follows :—

Notes.—In view of considerable textual modification effected in several Acts by the Government of India (Adaptation of Indian Laws) Order, 1937 made in pursuance of S 293 of Government of India Act, 1935, this Act had to be passed.

Short title.

1. This Act may be called the Repealing Act, 1938.

Repeal of certain enactments.

2. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Saving.

3. Where this Act repeals any enactment—

(*a*) which, while itself repealing another enactment, provided for the saving of rights, privileges, obligations or liabilities, acquired, accrued or incurred under that enactment or provided that references to the enactment by it repealed should be read as if made to the Act or Regulation by which that enactment was repealed, or that acts done under the enactment by it repealed should be deemed to have been done under the Act or Regulation by which that enactment was repealed, or

(*b*) which, while itself amending another enactment, provided that references to the enactment by it amended should be read as if made to that enactment as so amended, or that acts done under the enactment by it amended should be deemed to have been done under that enactment as so amended or by a new authority substituted in that enactment as so amended for a previously existing authority,

the repeal shall not affect the operation of any such provision as aforesaid.

Effect of repeal of amending enactment.

4. Where this Act repeals any enactment by which the text of any other enactment was amended by the express omission, insertion or substitution of any matter, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the commencement of this Act.

THE SCHEDULE.

ENACTMENTS REPEALED.

(*See* Section 2.)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		PART I.—Central Acts.	
1863	XXXI	The Official Gazettes Act, 1863.	The whole.
1867	XXXII	The Chief Commissioners' Powers Act.	So much as has not been repealed.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1870	XX	The Court-fees Act (1870) Amendment Act, 1870.	The whole.
1870	XXVII	The Indian Penal Code Amendment Act, 1870.	So much as has not been repealed.
1871	I	The Cattle-trespass Act, 1871.	Section 2 and the Schedule.
1871	V	The Prisoners Act, 1871.	So much as has not been repealed.
1871	XXII	The Bengal Chaukidari (Amendment) Act, 1871.	So much as has not been repealed.
1871	XXIII	The Pensions Act, 1871.	Section 2 and the Schedule.
1872	I	The Indian Evidence Act, 1872.	Section 2 and the Schedule.
1872	XV	The Indian Christian Marriage Act, 1872.	Section 2 and the Fifth Schedule.
1872	XVIII	The Indian Evidence Act Amendment Act.	So much as has not been repealed.
1872	XIX	The Indian Penal Code Amendment Act, 1872.	The whole.
1873	X	The Indian Oaths Act, 1873.	Section 15.
1874	IX	The European Vagrancy Act, 1874.	Section 2.
1874	XV	The Laws Local Extent Act, 1874.	Part XII of the Sixth Schedule.
1875	XIII	The Probate and Administration Act, 1875.	So much as has not been repealed.
1875	XV	The Punjab Laws Amendment Act, 1875.	The whole.
1876	X	The Bombay Revenue Jurisdiction Act, 1876.	Section 15.
1876	XVI	The Stage-Carriages Act (1861) Amendment Act, 1876.	So much as has not been repealed.
1876	XVIII	The Oudh Laws Act, 1876.	Section 2 and the First Schedule.
1877	IX	The Punjab Murderous Outrages (Amendment) Act, 1877.	Section 2.
1877	XVI	An Act to amend the Bombay Revenue Jurisdiction Act, 1876.	The whole.
1877	XIX	The Madras Civil Courts (Amendment) Act, 1877.	So much as has not been repealed.
1878	VIII	The Sea Customs Act, 1878.	Section 2 and Part I of the Schedule.
1878	XI	The Indian Arms Act, 1878.	Section 3 and the First Schedule.
1878	XII	The Punjab Laws (Amendment) Act, 1878.	Sections 1 and 5.
1878	XIV	An Act to assimilate certain powers of the Local Governments of the North-Western Provinces and Oudh.	So much as has not been repealed.
1878	XVII	The Northern India Ferries Act, 1878.	Section 2.
1879	II	The Central Provinces Laws Act, 1879.	The whole.
1879	XVIII	The Legal Practitioners Act, 1879.	Sections 2 and 42. The First Schedule.
1880	IX	The Bombay Civil Courts Act, 1880.	So much as has not been repealed.
1880	XV	The Bombay Revenue Jurisdiction Act, 1880.	So much as has not been repealed.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		Part I — Central Acts (*contd.*)	
1881	VII	The Bengal Cess (Amendment No. 1) Act, 1881.	The whole.
1881	X	The Coroners Act, 1881.	So much as has not been repealed.
1881	XIV	The Benares Family Domains Act, 1881.	So much as has not been repealed.
1881	XXI	The Broach and Kaira Incumbered Estates Act, 1881.	Section 2.
1881	XXIII	The Dekkhan Agriculturists' Relief Act, 1881.	So much as has not been repealed.
1881	XXIV	The Punjab Laws Amendment Act, 1881.	So much as has not been repealed.
1882	VIII	The Indian Penal Code Amendment Act, 1882.	The whole.
1882	XII	The Indian Salt Act, 1882.	Section 2 and the Schedule.
1882	XV	The Presidency Small Cause Courts Act, 1882.	Sections 2 and 3. The First Schedule.
1882	XXII	The Dekkhan Agriculturists' Relief Act, 1882.	So much as has not been repealed.
1883	I	The Central Provinces Local Self-Government Act, 1883.	So much as has not been repealed.
1883	II	The Elephant Preservation Act (1879) Amendment Act, 1883.	The whole.
1883	V	The Indian Merchant Shipping Act, 1883.	So much as has not been repealed.
1883	VI	The Calcutta Pilots (Amendment) Act, 1883.	The whole.
1883	XX	The Punjab District Boards Act, 1883.	The whole of Chapter V.
1884	V	The Chota Nagpur Incumbered Estates (Amendment) Act, 1884.	So much as has not been repealed.
1884	IX	The Legal Practitioners Act, 1884.	So much as has not been repealed.
1884	XII	The Agriculturists' Loans Act, 1884.	Section 3.
1885	II	The Negotiable Instruments Act, 1885.	So much as has not been repealed.
1885	III	The Transfer of Property Act (1882) Amendment Act, 1885.	The whole.
1885	IX	The Excise and Sea Customs Law Amendment Act, 1885.	So much as has not been repealed.
1885	X	An Act to amend the Oudh Estates Act, 1869.	The whole.
1885	XIII	The Indian Telegraph Act, 1885.	Section 2.
1885	XXI	The Madras Civil Courts Act, 1885.	So much as has not been repealed.
1886	III	The Northern India Ferries Act Amendment Act, 1886.	The whole.
1886	IV	The Indian Contract Act (1872) Amendment Act, 1886.	So much as has not been repealed.
1886	VI	The Births, Deaths and Marriages Registration Act, 1886.	The whole of Chapter IV.
1886	VIII	The Bengal Tenancy (Amendment) Act, 1886.	The whole.
1886	X	The Indian Criminal Law Amendment Act, 1886.	So much as has not been repealed.
1886	XIX	An Act to legalise the discharge by the Lieutenant-Governor of the North-Western Provinces of certain functions of the Governor-General in Council.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		Part I — Central Acts (*contd.*)	
1886	XXII	The Oudh Rent Act, 1886.	Section 2.
1886	XXIII	The Dekkhan Agriculturists' Relief Act, 1886.	So much as has not been repealed.
1887	II	The Sea Customs Act (1878) Amendment Act, 1887.	So much as has not been repealed.
1887	III	The Indian Evidence Act (1872) Amendment Act, 1887.	The whole.
1887	IX	The Provincial Small Cause Courts Act, 1887.	So much of Section 2 as has not been repealed.
1887	XVII	The Punjab Land Revenue Act, 1887.	Section 2 and the Schedule.
1888	XI	The Indian Telegraph (Presidency-towns) Act, 1888.	The whole.
1889	I	The Metal Tokens Act, 1889.	Section 9.
1889	IV	The Indian Merchandise Marks Act, 1889.	Sections 3, 10 and 11.
1889	V	The Coroners (Madras) Act, 1889.	So much as has not been repealed.
1889	VII	The Succession Certificate Act, 1889.	So much as has not been repealed.
1889	VIII	The Sea Customs Act (1878) Amendment Act, 1889.	So much as has not been repealed.
1889	XVI	The Central Provinces Land-revenue Act, 1889.	So much as has not been repealed.
1890	VIII	The Guardians and Wards Act, 1890.	Sections 2 and 52. The Schedule.
1890	IX	The Indian Railways Act, 1890.	Sections 2, 149 and 150. The First Schedule.
1890	X	The Press and Registration of Books Act (1867) Amendment Act, 1890.	So much as has not been repealed.
1890	XVI	The Births, Deaths and Marriages Registration Act (1886) Amendment Act, 1890.	So much as has not been repealed.
1890	XX	The North Western Provinces and Oudh Act, 1890.	Section 8(1) —the words from "and in Part IV" (where they first occur) to "shall be repealed." Section 8 (2). Section 9 (1). Sections 38, 44 to 47, 49 and 51 to 53. Section 55. Sections 57 to 61.
1891	I	The Cattle Trespass Act (1871) Amendment Act, 1891.	So much as has not been repealed.
1891	II	The Indian Christian Marriage Act (1872) Amendment Act, 1891.	So much as has not been repealed.
1891	III	The Indian Evidence Act (1872) Amendment Act, 1891.	So much as has not been repealed.
1891	VII	The Indian Registration of Ships Act, (1841) Amendment Act, 1891.	So much as has not been repealed.
1891	IX	The Indian Merchandise Marks and Sea Customs Acts Amendment Act, 1891.	So much as has not been repealed.
1891	X	The Indian Criminal Law Amendment Act, 1891.	So much as has not been repealed.
1891	XII	The Amending Act, 1891.	So much as has not been repealed.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1892	IV	The Court of Wards Act (Bengal) Amendment Act, 1892.	So much as has not been repealed.
1892	VII	The Madras City Civil Courts Act, 1892.	Section 12.
1893	I	The Bankers' Books Evidence Act, 1893.	So much as has not been repealed.
1894	I	The Land Acquisition Act, 1894.	So much of section 2 as has not been repealed.
1894	III	The Indian Criminal Law Amendment Act, 1894.	So much as has not been repealed.
1894	IV	The Amending Act, 1894.	So much as has not been repealed.
1894	IX	The Prisons Act 1894.	Section 2 and the Schedule.
1894	XIII	The Amending (Army) Act, 1894.	So much as has not been repealed.
1895	I	The Presidency Small Cause Courts Act, 1895.	So much as has not been repealed.
1895	III	The Indian Criminal Law Amendment Act, 1895.	So much as has not been repealed.
1895	VI	The Dekkhan Agriculturists' Relief Act, 1895.	The whole.
1895	VII	The Punjab Laws Act Amendment Act, 1895.	So much as has not been repealed.
1895	VIII	The Police Act (1861) Amendment Act, 1895	The whole.
1895	XVI	The Amending Act, 1895.	So much as has not been repealed.
1896	VI	The Indian Penal Code Amendment Act, 1896.	The whole.
1896	VIII	The Inland Bonded Warehouses Act 1896.	Section 3.
1896	IX	The Indian Railways Act (1890) Amendment Act, 1896.	So much as has not been repealed.
1896	XI	The Legal Practitioners Act, 1896.	The whole.
1896	XVII	The Punjab Land-revenue (Amendment) Act, 1896.	The whole.
1897	I	The Public Servants (Inquiries) Act (1850) Amendment Act, 1897.	Sections 2, 3 and 4.
1897	V	The Amending Act, 1897.	Sub-section (2) of section 2 and the Second Schedule.
1897	VI	The Negotiable Instruments Act Amendment Act, 1897.	So much as has not been repealed.
1897	VIII	The Reformatory Schools Act, 1897.	Sections 2 and 3.
1898	I	The Stage-Carriages Act (1861) Amendment Act, 1898.	So much as has not been repealed.
1898	IV	The Indian Penal Code Amendment Act, 1898.	So much as has not been repealed.
1898	XI	The Central Provinces Tenancy Act, 1898.	Section 100 and the Schedule.
1898	XII	The Central Provinces Land-revenue Act, 1898.	The whole.
1899	III	The Presidency Small Cause Courts Act, 1899.	So much as has not been repealed.
1899	V	The Indian Evidence Act, 1899.	So much as has not been repealed.
1899	VI	The Indian Contract Act Amendment Act, 1899.	The whole.
1899	IX	The Indian Arbitration Act, 1899.	Section 21.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		Part I — Central Acts (*contd.*)	
1899	X	The Carriers Act, 1899.	So much as has not been repealed.
1899	XI	The Court-fees Amendment Act, 1899.	So much as has not been repealed.
1899	XII	The Currency Notes Forgery Act, 1899.	So much as has not been repealed.
1899	XVI	The Northern India Canal and Drainage (Amendment) Act, 1899.	So much as has not been repealed.
1899	XVIII	The Land Improvement Loans (Amendment) Act, 1899.	So much as has not been repealed.
1899	XIX	The Currency Conversion (Army) Act, 1899.	So much as has not been repealed.
1899	XXIV	The Central Provinces Court of Wards Act, 1899.	Section 41 and the Schedule.
1900	II	The Transfer of Property Act, 1900.	So much as has not been repealed.
1900	VII	An Act amending Act XIX of 1899.	So much as has not been repealed.
1900	XII	The Bankers' Books Evidence Act, 1900.	So much as has not been repealed.
1900	XIII	The Punjab Alienation of Land Act, 1900.	Section 22.
1901	X	The Court-fees (Amendment) Act, 1901.	So much as has not been repealed.
1901	XI	The Amending Act, 1901.	Section 3 and the Second Schedule.
1902	VII	The United Provinces (Designation) Act, 1902.	The whole.
1903	I	The Amending Act, 1903.	Section 3 and the Second Schedule.
1903	II	The Indian Post Office (Amendment) Act, 1903.	The whole.
1903	XIII	The Lepers (Amendment) Act, 1903.	The whole.
1904	VI	The Transfer of Property (Amendment) Act, 1904.	The whole.
1904	XV	The Indian Stamp (Amendment) Act. 1904.	The whole.
1905	VI	The Court-fees (Amendment) Act, 1905.	The whole.
1906	II	The Sindh Incumbered Estates (Amendment) Act, 1906.	The whole.
1906	IV	The Presidency Small Cause Courts Act, 1906.	So much as has not been repealed.
1906	V	The Indian Stamp (Amendment) Act, 1906.	The whole.
1906	VIII	The Land Improvement and Agriculturists' Loans (Amendment) Act, 1906.	So much as has not been repealed.
1907	IV	The Repealing and Amending (Rates and Cesses) Act, 1907.	The whole.
1908	I	The Legal Practitioners (Amendment) Act, 1908.	So much as has not been repealed.
1908	III	The Indian Trusts (Amendment) Act, 1908.	The whole.
1908	IV	The Coroners (Amendment) Act, 1908.	So much as has not been repealed.
1908	XIII	The Central Provinces Financial Commissioner's Act 1908.	Sections 4, 5 and 6.
1908	XV	The Indian Ports Act, 1908.	Sections 69 and Schedule 2.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1908	XVI	The Indian Registration Act, 1908.	Section 93 and the Schedule.
1909	IV	The Whipping Act, 1909.	Section 7.
1910	III	The Indian Penal Code Amendment Act, 1910.	The whole.
1910	VI	The Indian Stamp (Amendment) Act, 1910.	The whole.
1910	VII	The Court-fees (Amendment) Act 1910.	The whole.
1910	XII	The Glanders and Farcy Law Amendment Act, 1910.	The whole.
1910	XIII	The Prisons (Amendment) Act, 1910	The whole.
1911	I	The Opium (Amendment) Act, 1911.	Sections 2 and 3.
1911	IV	The Indian Ports (Amendment) Act, 1911.	The whole.
1911	V	The Indian Tramways (Amendment) Act, 1911.	The whole.
1911	IX	The Births, Deaths and Marriages Registration (Amendment) Act, 1911.	The whole.
1911	XI	The Indian Universities (Amendment) Act, 1911.	The whole.
1911	XIII	The Indian Christian Marriage (Amendment) Act, 1911.	The whole.
1911	XIV	The Court-fees (Amendment) Act, 1911.	The whole.
1911	XVI	The Bengal, Agra and Assam Civil Courts (Amendment) Act, 1911.	The whole.
1912	I	The Indian Stamp (Amendment) Act, 1912.	The whole.
1912	III	The Indian Post Office (Amendment) Act, 1912.	The whole.
1912	VII	The Bengal, Bihar and Orissa and Assam Laws Act, 1912.	Sections 7 and 8 and Schedule E.
1912	IX	The Presidency Small Cause Courts (Amendment) Act, 1912.	The whole.
1912	X	The Indian Divorce (Amendment) Act, 1912.	The whole.
1913	I	The Indian Extradition (Amendment) Act, 1913.	The whole.
1913	V	The White Phosphorus Matches Prohibition Act, 1913.	Section 3.
1913	VIII	The Indian Criminal Law Amendment Act, 1913.	The whole.
1914	I	The Code of Civil Procedure (Amendment) Act, 1914.	The whole.
1914	IV	The Decentralization Act, 1914.	So much as has not been repealed.
1914	V	The Negotiable Instruments (Amendment) Act, 1914.	The whole.
1914	VI	The Provincial Small Cause Courts (Amendment) Act, 1914.	The whole.
1914	VII	The Indian Telegraph (Amendment) Act, 1914.	The whole.
1914	X	The Repealing and Amending Act, 1914.	So much as has not been repealed.
1914	XI	The Indian Companies (Amendment) Act, 1914.	The whole.
1914	XII	The Sea Customs (Amendment) Act, 1914.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1914	XIII	The Indian Life Assurance Companies (Amendment) Act, 1914.	The whole.
1914	XIV	The Indian Post Office and Telegraph (Amendment) Act, 1914.	The whole.
1914	XV	The Indian Army (Amendment) Act, 1914.	The whole.
1914	XVII	The Second Repealing and Amending Act, 1914.	So much as has not been repealed.
1915	III	The Foreigners (Amendment) Act, 1915.	The whole.
1915	VII	The Delhi Laws Act, 1915.	Section 7.
1915	IX	The Sea Customs (Amendment) Act, 1915.	The whole.
1915	XI	The Repealing and Amending Act, 1915.	So much as has not been repealed.
1915	XIII	The North-West Frontier Constabulary Act, 1915.	Section 22.
1916	I	The Indian Trusts (Amendment) Act, 1916.	The whole.
1916	VI	The Indian Ports (Amendment) Act, 1916.	The whole.
1916	XII	The Indian Lunacy (Amendment) Act, 1916.	The whole.
1916	XIII	The Amending Act, 1916.	So much as has not been repealed.
1917	X	The Indian Army (Amendment) Act, 1917.	The whole.
1917	XIV	The Prevention of Cruelty to Animals (Amendment) Act, 1917.	The whole.
1917	XV	The Indian Registration (Amendment) Act 1917.	The whole.
1917	XVII	The Government Savings Banks (Amendment) Act, 1917.	The whole.
1917	XXI	The Indian Trusts (Amendment) Act, 1917.	The whole.
1917	XXIII	The Presidency Small Cause Courts (Amendment) Act, 1917.	The whole.
1917	XXIV	The Repealing and Amending Act, 1917.	So much as has not been repealed.
1918	IV	The Indian Coinage (Amendment) Act, 1918.	The whole.
1918	XI	The Indian Army (Amendment) Act, 1918.	So much as has not been repealed.
1919	V	The Termination of the Present War (Definition) Act, 1919.	The whole.
1919	VI	The Indian Oaths (Amendment) Act, 1919.	The whole.
1919	VIII	The Negotiable Instruments (Amendment) Act, 1919.	The whole.
1919	X	The Excess Profits Duty Act, 1919.	So much as has not been repealed.
1919	XIII	The Sea Customs (Amendment) Act, 1919.	The whole.
1919	XVII	The Land Acquisition (Amendment) Act, 1919.	The whole.
1919	XVIII	The Repealing and Amending Act, 1919.	So much as has not been repealed.
1919	XX	The Indian Arms (Amendment) Act, 1919.	The whole.
1919	XXI	The Indian Coinage (Amendment) Act, 1919.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1919	XXIII	The Cinematograph (Amendment) Act, 1919.	The whole.
1919	XXVII	The Indemnity Act, 1919.	The whole.
1920	II	The Indian Army (Amendment) Act, 1920.	The whole.
1920	VI	The Inland Steam-vessels (Amendment) Act, 1920.	The whole.
1920	VIII	The Dourine (Amendment) Act, 1920.	The whole.
1920	IX	The Glanders and Farcy (Amendment) Act, 1920.	The whole.
1920	XI	The Presidency-towns Insolvency (Amendment) Act, 1920.	The whole.
1920	XXII	The Lepers (Amendment) Act, 1920.	The whole.
1920	XXIV	The Code of Civil Procedure (Amendment) Act, 1920.	The whole.
1920	XXV	The Negotiable Instruments (Amendment) Act, 1920.	The whole.
1920	XXVI	The Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920.	The whole.
1920	XXVII	The Indian Motor Vehicles (Amendment) Act, 1920.	The whole.
1920	XXIX	The Indian Patents and Designs (Amendment) Act, 1920.	The whole.
1920	XXXI	The Repealing and Amending Act, 1920.	So much as has not been repealed.
1920	XXXII	The Post Office Cash Certificates (Amendment) Act, 1920.	The whole.
1920	XXXVII	The Indian Army (Amendment) Act, 1920.	So much as has not been repealed.
1920	XXXVIII	The Devolution Act, 1920.	So much as has not been repealed.
1920	XXXIX	The Indian Elections Offences and Inquiries Act, 1920.	The whole of Part I.
1920	XLII	The Indian Companies (Amendment) Act, 1920.	The whole.
1920	XLIX	The Auxiliary Force Act, 1920.	Section 35.
1921	I	The Indian Tea Cess (Amendment) Act, 1921.	The whole.
1921	III	The Code of Civil Procedure (Amendment) Act, 1921.	The whole.
1921	VII	The Calcutta University Act, 1921.	The whole.
1921	XI	The Indian Works of Defence (Amendment) Act, 1921.	So much as has not been repealed.
1921	XII	The Negotiable Instruments (Amendment) Act, 1921.	The whole.
1921	XIII	The Carriers (Amendment) Act, 1921.	The whole.
1921	XV	The Indian Post Office (Amendment) Act, 1921.	The whole.
1921	XVI	The Indian Penal Code (Amendment) Act, 1921.	So much as has not been repealed.
1921	XIX	The Land Acquisition (Amendment) Act, 1921.	The whole.
1922	I	The Indian Electricity (Amendment) Act, 1922.	The whole.
1922	III	The Benares Hindu University (Amendment) Act, 1922.	The whole.
1922	VI	The Indian Lunacy (Amendment) Act, 1922.	The whole.
1922	X	The Indian Limitation (Amendment) Act, 1922.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1922	XIV	The Press Law Repeal and Amendment Act, 1922,	The whole.
1922	XV	The Indian Ports (Amendment) Act, 1922.	The whole.
1922	XVI	The Indian Extradition (Amendment) Act, 1922.	The whole.
1922	XVII	The Indian Museum (Amendment) Act, 1922.	The whole.
1922	XVIII	The Negotiable Instruments (Amendment) Act, 1922.	The whole.
1922	XIX	The Court-fees (Amendment) Act, 1922.	The whole.
1922	XX	The Parsi Marriage and Divorce (Amendment) Act, 1922.	The whole.
1922	XXI	The Official Trustees and Administrator General's Acts Amendment Act, 1922.	The whole.
1923	XI	The Repealing and Amending Act, 1923.	So much as has not been repealed.
1923	XII	The Criminal Law Amendment Act, 1923.	So much as has not been repealed.
1923	XIII	The Married Women's Property (Amendment) Act, 1923.	The whole.
1923	XV	The Indian Income-tax (Amendment) Act, 1923.	So much as has not been repealed.
1923	XVI	The Government Savings Banks (Amendment) Act, 1923.	The whole.
1923	XVII	The Prisoners (Amendment) Act, 1923.	The whole.
1923	XVIII	The Code of Criminal Procedure (Amendment) Act, 1923.	So much as has not been repealed.
1923	XX	The Indian Penal Code (Amendment) Act, 1923.	The whole
1923	XXVI	The Code of Civil Procedure (Amendment) Act, 1923.	The whole.
1923	XXVII	The Indian Income-tax (Further Amendment) Act, 1923.	The whole.
1923	XXIX	The Code of Civil Procedure (Second Amendment) Act, 1923.	The whole.
1923	XXX	The Special Marriage (Amendment) Act, 1923.	The whole.
1923	XXXI	The Indian Territorial and Auxiliary Forces (Amendment) Act, 1923.	The whole.
1923	XXXII	The Indian Lunacy (Amendment) Act, 1923.	The whole.
1923	XXXIII	The Indian Army (Amendment) Act, 1923.	The whole.
1923	XXXIV	The Cutchi Memons (Amendment) Act, 1923.	The whole.
1923	XXXV	The Code of Criminal Procedure (Further Amendment) Act, 1923.	The whole.
1923	XXXVII	The Code of Criminal Procedure (Second Amendment) Act, 1923.	So much as has not been repealed.
1923	XXXVIII	The Land Acquisition (Amendment) Act, 1923.	The whole.
1923	XXXIX	The Indian Ports (Amendment) Act, 1923.	The whole.
1923	XL	The Indian Electricity (Amendment) Act, 1923.	The whole.
1923	XLI	The Charitable and Religious Trusts (Amendment) Act, 1923.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1923	XLIII	The Indian Stamp (Amendment) Act, 1923.	The whole
1924	I	The Indian Cotton Cess (Amendment) Act, 1924.	The whole.
1924	VII	The Repealing and Amending Act, 1924.	So much as has not been repealed.
1924	X	The Indian Coinage (Amendment) Act, 1924.	The whole.
1924	XI	The Indian Income-tax (Amendment) Act, 1924.	The whole.
1924	XV	The Indian Motor Vehicles (Amendment) Act, 1924.	The whole.
1924	XVI	The Indian Post Office (Amendment) Act, 1924.	The whole.
1924	XVII	The Imperial Bank of India (Amendment) Act, 1924.	The whole.
1924	XVIII	The Indian Criminal Law Amendment Act, 1924.	The whole.
1925	I	The Indian Merchant Shipping (Amendment) Act, 1925.	The whole.
1925	V	The Indian Income-tax (Amendment) Act, 1925.	The whole.
1925	VII	The Cantonments (Amendment) Act, 1925.	The whole.
1925	VIII	The Obscene Publications Act, 1925.	The whole.
1925	IX	The Indian Ports (Amendment) Act, 1925.	The whole.
1925	X	The Cantonments (House-Accommodation Amendment) Act, 1925.	The whole.
1925	XI	The Indian Merchant Shipping (Second Amendment) Act, 1925.	The whole.
1925	XV	The Indian Stamp (Amendment) Act, 1925.	The whole.
1925	XVI	The Indian Income-tax (Second Amendment) Act, 1925.	The whole.
1925	XVII	The Prisons (Amendment) Act, 1925.	The whole.
1925	XVIII	The Indian Cotton Cess (Amendment Act, 1925.	The whole.
1925	XX	The Code of Civil Procedure (Amendment) Act, 1925.	The whole.
1925	XXI	The Religious Endowments (Amendment) Act, 1925.	The whole.
1925	XXIII	The Legislative Members Exemption Act, 1925.	The whole.
1925	XXIV	The Sikh Gurdwaras (Supplementary) Act, 1925.	Section 3.
1925	XXVII	The Opium (Amendment) Act, 1925.	So much as has not been repealed.
1925	XXVIII	The Provident Funds (Amendment) Act, 1925.	The whole.
1925	XXIX	The Indian Penal Code (Amendment) Act, 1925.	The whole.
1925	XXX	The Indian Limitation (Amendment) Act, 1925.	The whole.
1925	XXXII	The Oudh Courts (Supplementary) Act, 1925.	The whole.
1925	XXXIII	The Criminal Tribes (Amendment) Act, 1925.	The whole.
1925	XXXIV	The Cotton Transport (Amendment) Act, 1925.	The whole.
1925	XXXVI	The Indian Ports (Amendment) Act, 1925.	So much as has not been repealed.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		Part I — Central Acts (*contd.*)	
1925	XXXVII	The Repealing and Amending Act, 1925.	So much as has not been repealed.
1925	XXXVIII	The Transfer of Property (Amendment) Act, 1925.	The whole.
1926	I	The Small Cause Courts (Attachment of Immovable Property) Act, 1926.	The whole.
1926	II	The Code of Criminal Procedure (Amendment) Act, 1926.	So much as has not been repealed.
1926	IV	The Guardians and Wards (Amendment) Act, 1926.	So much as has not been repealed.
1926	V	The Indian Lunacy (Amendment) Act, 1926.	The whole.
1926	VI	The Code of Civil Procedure (Amendment) Act, 1926.	The whole.
1926	IX	The Insolvency (Amendment) Act, 1926.	The whole.
1926	X	The Code of Criminal Procedure (Second Amendment) Act, 1926.	The whole.
1926	XIII	The Indian Registration (Amendment) Act, 1926.	The whole.
1926	XIV	The Madras Civil Courts (Amendment) Act, 1926.	The whole.
1926	XV	The Legal Practitioners (Amendment) Act, 1926.	The whole.
1926	XVIII	The Madras Civil Courts (Second Amendment) Act, 1926.	The whole.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act, 1926.	So much as has not been repealed.
1926	XXIV	The Indian Income-tax (Amendment) Act, 1926.	The whole.
1926	XXV	The Indian Divorce (Amendment) Act, 1926.	The whole.
1926	XXVII	The Transfer of Property (Amendment) Act, 1926.	The whole.
1926	XXVIII	The Usurious Loans (Amendment) Act, 1926.	The whole.
1926	XXIX	The Workmen's Compensation (Amendment) Act, 1926.	The whole.
1926	XXX	The Negotiable Instruments (Interest) Act, 1926.	So much as has not been repealed.
1926	XXXI	The Indian Evidence (Amendment) Act, 1926.	The whole.
1926	XXXII	The Administrator General's (Amendment) Act, 1926.	The whole.
1926	XXXIII	The Indian Companies (Amendment) Act, 1926.	The whole.
1926	XXXV	The Cantonments (Amendment) Act, 1926.	The whole.
1926	XXXVI	The Code of Criminal Procedure (Third Amendment) Act, 1926.	The whole.
1926	XXXIX	The Provincial Insolvency (Amendment) Act, 1926.	So much as has not been repealed.
1926	XL	The Indian Succession (Second Amendment) Act, 1926.	The whole.
1927	I	The Indian Limitation (Amendment) Act, 1927.	The whole.
1927	II	The Indian Registration (Amendment) Act, 1927.	The whole.
1927	V	The Indian Finance Act, 1927.	So much as has not been repealed.
1927	VI	The Madras Salt (Amendment) Act, 1927.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1927	VII	The Provident Funds (Amendment) Act, 1927.	The whole.
1927	VIII	The Sea Customs (Amendment) Act, 1927.	The whole.
1927	IX	The Indian Limitation (Second Amendment) Act, 1927.	The whole.
1927	X	The Repealing and Amending Act, 1927.	So much as has not been repealed.
1927	XI	The Insolvency (Amendment) Act, 1927.	The whole.
1927	XIII	The Indian Bar Councils (Amendment) Act, 1927.	The whole.
1927	XIV	The Indian Merchant Shipping Amendment) Act, 1927.	The whole.
1927	XV	The Indian Divorce (Amendment) Act, 1927.	The whole.
1927	XVII	The Indian Lighthouse Act, 1927.	Section 22 and the Schedule.
1927	XVIII	The Indian Succession (Amendment) Act, 1927.	The whole.
1927	XIX	The Presidency-towns Insolvency (Amendment) Act, 1927.	The whole.
1927	XXI	The Indian Securities (Amendment) Act, 1927.	The whole.
1927	XXII	The Societies Registration (Amendment) Act, 1927.	The whole.
1927	XXV	The Criminal Law Amendment Act, 1927.	The whole.
1927	XXVI	The Cantonments (Amendment) Act, 1927.	The whole.
1927	XXVII	The Indian Emigration (Amendment) Act, 1927.	The whole.
1927	XXVIII	The Indian Income-tax (Amendment) Act, 1927.	The whole.
1927	XXX	The Indian Divorce (Second Amendment) Act, 1927.	The whole.
1928	II	The Indian Securities (Amendment) Act, 1928.	The whole.
1928	III	The Indian Income-tax (Amendment) Act, 1928.	The whole.
1928	IV	The Inland Bonded Warehouses (Amendment) Act, 1928.	The whole.
1928	VI	The Indian Merchant Shipping (Amendment) Act, 1928.	The whole.
1928	IX	The Indian Territorial Force (Amendment) Act, 1928.	The whole.
1928	X	The Auxiliary Force (Amendment) Act, 1928.	The whole.
1928	XI	The Chittagong Port (Amendment) Act, 1928.	The whole.
1928	XIV	The Indian Succession (Amendment) Act, 1928.	The whole.
1928	XV	The Indian Trade Unions (Amendment) Act, 1928.	The whole.
1928	XVI	The Indian Income-tax (Amendment) Act, 1928.	The whole.
1928	XVIII	The Repealing and Amending Act, 1928.	So much as has not been repealed.
1928	XIX	The Madras Salt (Amendment) Act, 1928.	The whole.
1929	I	The Indian Limitation (Amendment) Act, 1929.	The whole.
1929	III	The Presidency-Towns Insolvency (Amendment) Act, 1929.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1929	IX	The Indian Boilers (Amendment) Act, 1929.	The whole.
1929	XI	The Bengal Pilot Service (Centralization of Administration) Act, 1929.	The whole.
1929	XII	The Indian Income-tax (Provident Funds Relief) Act, 1929.	The whole.
1929	XIII	The Indian Territorial Force (Amendment) Act, 1929.	The whole.
1929	XIV	The Indian Cotton Cess (Amendment) Act, 1929.	The whole.
1929	XV	The Indian Registration (Amendment) Act, 1929.	The whole.
1929	XVII	The Guardians and Wards (Amendment) Act, 1929.	The whole.
1929	XVIII	The Indian Succession (Amendment) Act, 1929.	The whole.
1929	XX	The Transfer of Property (Amendment) Act, 1929.	The whole.
1929	XXI	The Transfer of Property (Amendment) Supplementary Act, 1929.	Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.
1930	I	The Provident Funds (Amendment) Act, 1930.	The whole.
1930	II	The Dangerous Drugs Act, 1930.	Section 40 and so much of Schedule II as has not been repealed.
1930	III	The Indian Sale of Goods Act, 1930.	Section 65.
1930	IV	The Indian Contract (Amendment) Act, 1930.	The whole.
1930	V	The Transfer of Property (Amendment) Act, 1930.	The whole.
1930	VI	The Prisons (Amendment) Act, 1930.	The whole.
1930	VII	The Indian Patents and Designs (Amendment) Act, 1930.	The whole.
1930	VIII	The Repealing and Amending Act, 1930.	So much as has not been repealed.
1930	IX	The Cantonments (House-Accommodation Amendment) Act, 1930.	The whole.
1930	X	The Insolvency Law (Amendment) Act, 1930.	The whole.
1930	XIII	The Inland Steam-vessels (Amendment) Act, 1930.	The whole.
1930	XIV	The Indian Railways (Amendment) Act, 1930.	The whole.
1930	XVI	The Transfer of Property (Amendment) Supplementary Act, 1930.	The whole.
1930	XIX	The Indian Companies (Amendment) Act, 1930.	Section 2.
1930	XX	The Destructive Insects and Pests (Amendment) Act, 1930.	The whole.
1930	XXI	The Indian Income-tax (Amendment) Act, 1930.	The whole.
1930	XXII	The Indian Income-tax (Second Amendment) Act, 1930.	The whole.
1930	XXIII	The Indian Income-tax (Third Amendment) Act, 1930.	The whole.
1930	XXIV	The Indian Lac Cess Act, 1930.	Section 11.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
	Part I — Central Acts (*contd.*)		
1930	XXV	The Negotiable Instruments (Amendment) Act, 1930.	The whole.
1930	XXVI	The Indian Forest (Amendment) Act, 1930.	The whole.
1930	XXVII	The Indian Telegraph (Amendment) Act, 1930.	The whole.
1930	XXVIII	The Bombay Civil Courts (Amendment) Act, 1930.	The whole.
1930	XXIX	The Benares Hindu University (Amendment) Act, 1930.	The whole.
1931	IV	The Indian Income-tax (Amendment) Act, 1931.	The whole.
1931	V	The Indian Territorial Force (Amendment) Act, 1931.	The whole.
1931	VI	The Auxiliary Force (Amendment) Act, 1931.	The whole.
1931	VII	The Cantonments (Amendment) Act, 1931.	The whole.
1931	VIII	The Indian Naval Armament (Amendment) Act, 1931.	The whole.
1931	IX	The Indian Merchant Shipping (Amendment) Act, 1931.	The whole.
1931	X	The Vizagapatam Port Act, 1931.	The whole.
1931	XI	The Indian Ports (Amendment) Act, 1931.	The whole.
1931	XII	The Indian Reserve Forces (Amendment) Act, 1931.	The whole.
1931	XVI	The Provisional Collection of Taxes Act, 1931.	Section 6.
1931	XVII	The Indian Succession (Amendment) Act, 1931.	The whole.
1931	XVIII	The Aligarh Muslim University (Amendment) Act, 1931.	The whole.
1931	XIX	The Land Customs (Amendment) Act, 1931.	The whole.
1932	I	The Indian Companies (Supplementary Amendment) Act, 1932.	The whole.
1932	VII	The Salt Additional Import Duty (Extending) Act, 1932.	The whole.
1932	VIII	The Bengal Criminal Law Amendment (Supplementary) Act, 1932.	Section 5.
1932	IX	The Indian Partnership Act, 1932.	Section 73 and Schedule II.
1932	X	The Code of Civil Procedure (Amendment) Act, 1932.	The whole.
1932	XIII	The Sugar Industry (Protection) Act, 1932.	Section 2 and the Schedule.
1932	XIV	The Indian Air Force Act, 1932.	Section 130 and the Schedule.
1932	XVI	The Indian Emigration (Amendment) Act, 1932.	The whole.
1932	XVII	The Cantonments (Amendment) Act, 1932.	The whole.
1932	XVIII	The Ancient Monuments Preservation (Amendment) Act, 1932.	The whole.
1932	XIX	The Trade Disputes (Amendment) Act, 1932.	The whole.
1932	XX	The Port Haj Committees Act, 1932.	Section 24.
1932	XXI	The Code of Criminal Procedure (Amendment) Act, 1932.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*contd.*)			
1932	XXIII	The Criminal Law Amendment Act, 1932.	Sections 11, 12, 13, 14 and 16.
1933	III	The Indian Forest (Amendment) Act, 1933.	The whole.
1933	X	The Auxiliary Force (Amendment) Act, 1933.	The whole.
1933	XI	The Indian Merchant Shipping (Amendment) Act, 1933.	The whole.
1933	XII	The Indian Income-tax (Amendment) Act, 1933.	The whole.
1933	XV	The Workmen's Compensation (Amendment) Act, 1933.	The whole.
1933	XVI	The Land Acquisition (Amendment) Act, 1933.	The whole.
1933	XVIII	The Indian Income-tax (Second Amendment) Act, 1933.	The whole.
1933	XIX	The Indian Railways (Amendment) Act, 1933.	The whole.
1933	XXI	The Indian Arbitration (Amendment) Act, 1933.	The whole.
1933	XXII	The Cantonments (House-Accommodation Amendment) Act, 1933.	The whole.
1933	XXV	The Indian Merchant Shipping (Second Amendment) Act, 1933.	The whole.
1933	XXVI	The Dangerous Drugs (Amendment) Act, 1933.	The whole.
1933	XXVIII	The Indian Tariff (Second Amendment) Act, 1933.	So much as has not been repealed.
1934	III	The Imperial Bank of India (Amendment) Act, 1934.	The whole.
1934	V	The Indian Medical Council (Amendment) Act, 1934.	The whole.
1934	XVII	The Negotiable Instruments (Amendment) Act, 1934.	The whole.
1934	XVIII	The Indian Trusts (Amendment) Act, 1934.	The whole.
1934	XXI	The Sea Customs (Amendment) Act, 1934.	The whole.
1934	XXII	The Indian Aircraft Act, 1934.	Section 20.
1934	XXIV	The Repealing and Amending Act, 1934.	So much as has not been repealed.
1934	XXIX	The Indian Income-tax (Amendment) Act, 1934.	The whole.
1934	XXX	The Petroleum Act, 1934.	Section 32 and the Schedule.
1934	XXXIII	The Indian Army (Amendment) Act, 1934.	The whole.
1934	XXXIV	The Indian Navy (Discipline) Act, 1934.	Section 4 and the Second Schedule.
1934	XXXV	The Amending Act, 1934.	The whole.
1935	I	The Indian Naturalization (Amendment) Act, 1935.	The whole.
1935	III	The Indian Tea Cess (Amendment) Act, 1935.	The whole.
1935	VI	The Aligarh Muslim University (Amendment) Act, 1935.	The whole.
1935	VII	The Indian Army (Amendment) Act, 1935.	The whole.
1935	VIII	The Central Provinces Courts (Supplementary) Act, 1935.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part I — Central Acts (*concld.*)			
1935	IX	The Provincial Small Cause Courts (Amendment) Act, 1935.	The whole.
1935	X	The Provincial Insolvency (Amendment) Act, 1935.	The whole.
1935	XI	The Factories (Amendment) Act, 1935.	The whole.
		PART II. REGULATIONS.	
1876	III	The Andaman and Nicobar Islands Regulation, 1876.	Section 2.
1880	II	The Assam Frontier Tracts Regulation, 1880.	So much as has not been repealed.
1883	I	The Sylhet and Cachar Rural Police Regulation, 1883.	So much as has not been repealed.
1884	I	The Andaman and Nicobar Islands Regulation, 1884.	The whole.
1884	III	The Assam Frontier Tracts Regulation, 1884.	The whole.
1886	II	The Sonthal Parganas Rent Regulation, 1886.	Sections 4 and 28.
1887	XIII	The Hazara Tenancy Regulation, 1887.	Section 2.
1888	I	The Ajmer Government Wards Regulation, 1888.	Section 2.
1889	II	The Assam Land and Revenue Regulation, 1889.	The whole.
1891	VII	The Assam Forest Regulation, 1891.	Section 2.
1892	III	The Sindh Frontier Regulation, 1892.	Section 2 (2).
1893	V	The Sonthal Parganas Justice Regulation, 1893.	Section 24.
1893	IX	The Ajmer Amending Regulation, 1893.	So much as has not been repealed.
1896	VIII	The British Baluchistan Criminal Justice Regulation, 1896.	Section 2.
1896	IX	The British Baluchistan Civil Justice Regulation, 1896.	Section 2 and the Schedule.
1898	II	The Assam Frontier Tracts Regulation (1880) Amendment Regulation, 1893.	The whole.
1899	I	The Coorg Land and Revenue Regulation, 1899.	Section 2 and the First Schedule.
1899	III	The Sonthal Parganas Justice and Laws Regulation, 1899.	So much as has not been repealed.
1901	I	The Coorg Courts Regulation, 1901.	Section 20 and the Schedule.
1901	III	The Frontier Crimes Regulation, 1901.	Section 64.
1904	I	A Regulation to provide for certain modifications in the Punjab Alienation of Land Act, 1900, in its application to the North-West Frontier Province.	The whole.
1904	III	The Hazara Tenancy (Amendment) Regulation, 1904.	The whole.
1904	V	The North-West Frontier Province Court of Wards Regulation, 1904.	Section 3.
1905	II	The Assam Land and Revenue (Amendment) Regulation, 1905.	The whole.
1905	IV	The Coorg Courts (Amendment) Regulation, 1905.	The whole.
1906	I	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1906.	The whole.

THE SCHEDULE (*contd.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
Part II — Regulations (*contd.*)			
1907	II	The Coorg Municipal Regulation, 1907.	Section 167.
1907	III	The Sonthal Parganas Rent (Amendment) Regulation, 1907.	The whole.
1907	IV	The Coorg Land and Revenue (Amendment) Regulation, 1907.	The whole.
1907	V	The Ajmere Land and Revenue (Amemdment) Regulation, 1907.	The whole.
1908	I	The Coorg Land and Revenue (Amendment) Regulation, 1908.	The whole.
1908	III	The Sonthal Parganas Settlement (Amendment) Regulation, 1908.	Sections 2, 4, 5, 8, 9 and 10.
1908	IV	The Andaman and Nicobar Islands Regulation, 1908.	The whole.
1911	I	The North-West Frontier Gazette Regulation, 1911.	The whole.
1911	IV	The Coorg Land and Revenue (Amendment) Regulation, 1911.	So much as has not been repealed.
1911	V	The Coorg District Fund (Amendment) Regulation, 1911.	The whole.
1912	II	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1912.	So much as has not been repealed.
1912	III	The Assam Forest (Amendment) Regulation, 1912.	The whole.
1912	IV	The Sonthal Parganas Justice (Amendment) Regulation, 1912.	The whole.
1912	V	The British Baluchistan Forest (Amendment) Regulation, 1912.	The whole.
1913	I	The Coorg District Fund (Amendment) Regulation, 1913.	The whole.
1914	II	The Ajmer Repealing and Amending Regulation, 1914.	So much as has not been repealed.
1915	II	The Andaman and Nicobar Islands (Amendment) Regulation, 1915.	The whole.
1919	I	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1919.	Section 2.
1919	II	The British Baluchistan Criminal and Civil Justice (Amendment) Regulation, 1919.	Sections 2 and 3.
1919	III	The Hazara Upper Tanawal (Amendment) Regulation, 1919.	The whole.
1919	IV	The Hazara Forest (Amendment) Regulation, 1919.	The whole.
1920	II	The British Baluchistan Civil Justice (Amendment) Regulation, 1920.	The whole.
1920	IV	The Chittagong Hill Tracts (Amendment) Regulation, 1920.	The whole.
1921	III	The British Baluchistan Bazars (Amendment) Regulation, 1921.	The whole.
1921	IV	The Ajmer Land and Revenue (Amendment) Regulation, 1921.	The whole.
1922	I	The Assam Forest (Amendment) Regulation, 1922.	The whole.
1923	II	The Coorg Courts (Amendment) Regulation, 1923.	The whole.
1925	IV	The Chittagong Hill Tracts (Amendment) Regulation, 1925.	The whole.

THE SCHEDULE (*concld.*)

Year	No.	Short title.	Extent of repeal.
1	2	3	4
		Part II — Regulations (*contd.*)	
1925	V	The Bengal Eastern Frontier (Amendment) Regulation, 1925.	The whole.
1925	VI	The Ajmer-Merwara Municipalities Regulation, 1925.	Section 2 and the First Schedule.
1925	VII	The Sonthal Parganas Settlement (Amendment) Regulation, 1925.	The whole.
1926	I	The Laccadive Islands and Minicoy (Amendment) Regulation, 1926.	So much as has not been repealed.
1926	III	The Andaman and Nicobar Islands (Land-tenure) Regulation, 1926.	Section 27.
1926	IV	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1926.	So much as has not been repealed.
1926	V	The Ajmer Rural Boards (Amendment) Regulation, 1926.	The whole.
1926	VII	The Frontier Crimes (Amendment) Regulation, 1926.	The whole.
1926	VIII	The British Baluchistan Bazars (Amendment) Regulation, 1926.	The whole.
1927	II	The Andaman and Nicobar Islands (Amendment) Regulation, 1927.	The whole.
1927	III	The Punjab Frontier Crossing (Amendment) Regulation, 1927.	The whole.
1928	I	The Sonthal Parganas Settlement (Amendment) Regulation, 1928.	The whole.
1928	V	The Frontier Crimes (Amendment) Regulation, 1928.	The whole.
1930	I	The Andaman and Nicobar Islands (Amendment) Regulation, 1930.	The whole.
1930	III	The Andaman and Nicobar Islands (Second Amendment) Regulation, 1930.	The whole.
1930	VI	The Panth Piploda Laws (Amendment) Regulation, 1930.	The whole.
1930	VII	The Coorg Courts (Amendment) Regulation, 1930.	The whole.
1931	I	The North-West Frontier Province Courts Regulation, 1931.	Sections 38 and 39.
1931	VII	The Panth Piploda Laws (Amendment) Regulation, 1931.	The whole.
1932	I	The Ajmer Courts (Amendment) Regulation, 1932.	The whole.
1932	III	The Ajmer Rural Boards (Amendment) Regulation, 1932.	The whole.
1933	IV	The Sonthal Parganas Justice (Amendment) Regulation, 1933.	The whole.
1934	I	The Sonthal Parganas Settlement (Amendment) Regulation, 1934.	The whole.
1935	IV	The Ajmer-Merwara Municipalities (Amendment) Regulation, 1935.	The whole.

The Indian Companies (Amendment) Act, 1938

[Received G. G.'s assent on 26th February 1938.]

An Act further to amend the Indian Companies Act, 1913, for certain purposes.

WHEREAS it is expedient further to amend the Indian Companies Act, 7 of 1913, for the purposes hereinafter appearing; It is hereby enacted as follows :—

Notes.—The object of this Act is to remove certain inaccuracies and correct certain errors which crept into the Act of 1913 in the course of amendment in 1936. And (See statement of Objects and Reasons.)

1. This Act may be called the Indian Companies (Amendment) Act, 1938.

Short title.

2. In the first proviso to sub-section (*2*) of S. 17 of the Indian Companies Act, 7 of 1913 (hereinafter referred to as the said Act), for the word and figure "regulation 78" the words and figures "regulations 78, 79, 80, 81 and 82" shall be substituted.

Amendment of S. 17, Act 7 of 1913.

3. In sub-section (*1*) of section 34 of the said Act, for the word, brackets and figure "sub-section (*4*)" the word, brackets and figure "sub-section (*7*)" shall be substituted.

Amendment of S. 34, Act 7 of 1913.

4. In clause (*a*) of sub-section (*1*) of section 86I of the said Act, for the figure "84" the figure "85" shall be substituted.

Amendment of S. 86I, Act 7 of 1913.

5. In sub-section (*1*) of section 86D of the said Act, for the words "or to a private company of which such director is a director" the words "or to a private company of which such director is a member or director" shall be substituted.

Amendment of S. 86D, Act 7 of 1913.

6. In sub-section (*1*) of section 87D of the said Act, for the words "or to any director of the private company" the words "or to any member or director of the private company" shall be substituted.

Amendment of S. 87D, Act 7 of 1913.

7. In sub-sections (*1*) and (*2*) of section 102 of the said Act, for the word and figure "section 101" the words and figures "section 98 or section 101" shall be substituted.

Amendment of S. 102, Act 7 of 1913.

8. In section 130 of the said Act, sub-section (*3*) shall be renumbered as sub-section (*4*) and the following shall be inserted as sub-section (*3*), namely :—

Amendment of S. 130, Act 7 of 1913.

"(*3*) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (*1*) and sub-section (*2*) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarized returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (*2*)."

9. In section 134 of the said Act,—

Amendment of S. 134, Act 7 of 1913.

(*a*) in sub-section (*1*),—

(*i*) after the words "profit and loss account" the words "or the income and expenditure account as the case may be" shall be inserted; and

(*ii*) for the words "a copy of the balance-sheet" the words "three copies thereof" shall be substituted ;

(*b*) in sub-section (*2*), for the word "copy" the word "copies" shall be substituted.

Notes:—This amendment is to rectify the error by which in this section mention of the income and expenditure account in the case of a company not trading for profit has been inadvertently omitted. (See S. 131.)

10. In sub-section (*5*) of section 153A of the said Act, for the word, brackets and figure "sub-section (*4*)" the word, brackets and figure "sub-section (*6*)" shall be substituted.

Amendment of S. 153A, Act 7 of 1913.

11. In section 237 of the said Act,—

Amendment of S. 237, Act 7 of 1913.

(*a*) in sub-section (*6*), the words beginning with "and it shall be the duty of" and ending "which he is reasonably able to give", and the words beginning with "For the purpose of this sub-section" and ending "whether that person is or is not an officer of the company" shall be omitted ;

(*b*) after sub-section (*6*) the following sub-section shall be inserted, namely :—

"(*7*) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connexion with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company." ; and

(*c*) existing sub-section (*7*) shall be re-numbered as sub-section (*8*), and in that sub-section as so re-numbered, for the word, brackets and figure "sub-section (*6*)" the word, brackets and figure "sub-section (*7*)" shall be substituted.

Amendment of S. 277, Act 7 of 1913.

12. In section 277 of the said Act,—

(*a*) in sub-section (*1*),—

(*i*) after clause (*d*) the following clause shall be inserted, namely :—

"(*e*) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company:" ; and

(*ii*) for the words "or in such address" the words "or in any such address" shall be substituted ;

(*b*) in sub-section (*3*),—

(*i*) in sub-clause (i), for the words "a copy of that balance-sheet" the words "three copies of that balance-sheet" shall be substituted, and after the words "such supplementary statements" the words "in triplicate" shall be inserted ;

(*ii*) in sub-clause (ii), after the words "such a statement" the words "in triplicate" shall be inserted.

Amendment of S. 277D, Act 7 of 1913.

13. Section 277D of the said Act shall be re-numbered as sub-section (*1*) of that section and to the sub-section so re-numbered the following shall be added, namely :—

"Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company ;

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-clause (*i*) of the proviso to sub-section (*1*) of section 109 and the proviso to sub-section (*1*) of S. 109A shall apply as if the property wherever situated were situated outside British India.

(*2*) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1938 :

Provided that where the provisions of section 109 and sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938."

Amendment of S. 277E, Act 7 of 1913.

14. To section 277E of the said Act the following shall be added, namely :—

"Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company."

15. In clause (*2*) of section 277F of the said Act, after the words "managing agent" the words "of a company not being a banking company" shall be inserted.

Amendment of S. 277F, Act 7 of 1913.

Notes.—This is to remove an inconsistency between Cl. (2) of S. 277F and S. 277H which recognizes the capacity of a banking company to act as managing agent of another banking company.

16. In sub-section (*1*) of section 277L of the said Act, before the words "a statement" the words "three copies of" shall be inserted

Amendment of S. 277L, Act 7 of 1913.

17. (*1*) Section 277M of the said Act shall be re-numbered as sub-section (*1*) of that section and, in the said section so re-numbered, for the words "A banking company

Amendment of S. 277M, Act 7 of 1913.

shall not form or hold shares in any subsidiary company except a subsidiary company of its own" the words "A banking company shall not form any subsidiary company except a subsidiary company" shall be substituted.

(2) To the said section as so re-numbered the following sub-section shall be added, namely:

"(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company:

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 22 of 1936."

Notes. — This amendment is introduced to correct an inconsistency between S. 277M and Cl. (1) of S. 277F. The words "whether as pledgee, mortgagee or absolute owner" were added on the suggestion of the Select Committee and "forty" was substituted for "fifty" on their recommendation.

Substitution of new section for S. 284, Act 7 of 1913.

18. For section 284 of the said Act the following section shall be substituted, namely:—

"284. The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 22 of 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 22 of 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 22 of 1936 had not been passed."

Saving of pending proceedings for winding up.

Amendment of First Schedule, Act 7 of 1913.

19. In the First Schedule to the said Act, in Table A,—

(a) in regulation 56 for the words "by at least three members" the following shall be substituted, namely:—

"in accordance with the provisions of clause (c) of sub-section (1) of section, 79 of the Indian Companies Act, 7 of 1913,";

(b) in clause (a) of regulation 77, for the figure "84" the figure "85" shall be substituted;

(c) in regulation 106, after the words "such profit and loss accounts" the words "income and expenditure accounts" shall be inserted;

(d) in regulation 109, for the word "seven" the word "fourteen" shall be substituted; and

(e) in regulation 116, the words "No other persons shall be entitled to receive notices of general meetings" shall be omitted.

Amendment of Second Schedule, Act 7 of 1913.

20. In the Second Schedule to the said Act, in the last entry of the left-hand column of Form I, for the word "amounts" the word "accounts" shall be substituted.

Amendment of Third Schedule, Act 7 of 1913.

21. In the Third Schedule to the said Act, for the entry "BOOK DEBITS" in the right hand column of Form F the entry "BOOK DEBTS" shall be substituted.

ACT NO. III OF 1938.

Dangerous Drugs (Amendment) Act, 1938

[Recd. G. G.'s assent on 26th February, 1938.]

An Act further to amend the Dangerous Drugs Act, 1930, for a certain purpose.

WHEREAS it is expedient further to amend the Dangerous Drugs Act, 2 of 1930, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Notes.—This has been added to cover the case of dangerous drugs conveyed in a vessel that calls at a British Indian Port if the drugs are not transhipped or discharged at such port but are retained on board and are so manifested.

Short title.

1. This Act may be called the Dangerous Drugs (Amendment) Act, 1938.

Amendment of S. 2, Act 2 of 1930.

2. To clause (i) of section 2 of the Dangerous Drugs Act, 2 of 1930, the following words shall be added, namely:—

", and includes the bringing into any port or place in British India of a dangerous drug intended to be taken out of British India without being removed from the ship or conveyance in which it is being carried".

ACT NO. IV OF 1938.

The Insurance Act, 1938.

[Received G. G.'s assent on 26th February 1938.]

An Act to consolidate and amend the law relating to the business of insurance.

WHEREAS it is expedient to consolidate and amend the law relating to the business of insurance ; It is hereby enacted as follows : —

Notes.—Owing to the marked increase in the volume of life insurance business and the development of other forms of insurance business in British India, this Act was passed.

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (*1*) This Act may be called the Insurance Act, 1938.

(*2*) It extends to the whole of British India.

(*3*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "actuary" means an actuary possessing such qualifications as may be prescribed ;

(*2*) "policy-holder" includes the person who is the absolute assignee of the benefits under the policy ;

(*3*) "approved securities" means Government securities, and any other security charged on the revenues of the Central Government or of a Provincial Government, or guaranteed fully as regards principal and interest by the Secretary of State in Council or the Secretary of State or the Central Government or a Provincial Government ; and any debenture or other security for money issued under the authority of any Act of a Legislature established in British India by or on behalf of a port trust or municipal corporation or city improvement trust in any Presidency-town, or by or on behalf of the trustees of the port of Karachi ;

(*4*) "auditor" means a person qualified under the provisions of section 144 of the Indian Companies Act, 7 of 1913, to act as an auditor of companies :

(*5*) "certified" in relation to any copy or translation of a document required to be furnished by or on behalf of an insurer means certified by a principal officer of the insurer to be a true copy or a correct translation, as the case may be ;

(*6*) "Court" means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction ;

(*7*) "Government securities" means Government securities as defined in the Indian Securities Act, 10 of 1920 ;

(*8*) "insurance company" means any insurer being a company, association or partnership which may be wound up under the Indian Companies Act, 7 of 1913, or to which the Indian Partnership Act, 9 of 1932, applies ;

(*9*) "insurer" means—

(*a*) any individual or unincorporated body of individuals or body corporate incorporated under the law of any country other than British India, carrying on insurance business [not being a person specified in sub-clause (*c*) of this clause] which—

(*i*) carries on that business in British India, or

(*ii*) has his or its principal place of business or is domiciled in British India ;

(*b*) any body corporate [not being a person specified in sub-clause (*c*) of this clause] carrying on the business of insurance, which is a body corporate incorporated under any law for the time being in force in British India ; or stands to any such body corporate in the relation of a subsidiary company within the meaning of the Indian Companies Act, 7 of 1913, as defined by sub-section (*2*) of section 2 of that Act,

and

(*c*) any person who in British India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorized within the terms of such contract to issue protection notes, cover notes, or other documents granting insurance cover to others on behalf of the underwriters,

but does not include an insurance agent licensed under section 42 or a provident society to which the provisions of Part III apply ;

(*10*) "insurance agent" means an insurance agent licensed under section 42 being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business ;

(*11*) "life insurance business" includes annuity business, that is to say, the business of effecting contracts of insurance for

the granting of annuities on human life and, if so provided in the contract of insurance, disability and double indemnity accident benefits ;

(*12*) " manager " and " officer " have the meanings assigned to those expressions in clauses (*9*) and (*11*) respectively of S. 2 of the Indian Companies Act, 7 of 1913 ;

(*13*) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement, and includes any person, firm or company occupying such position by whatever name called.

Explanation. — If a person occupying the position of managing agent calls himself manager or managing director, he shall nevertheless be regarded as managing agent for the purposes of S. 32 of this Act;

(*14*) "prescribed" means prescribed by rules made under S. 114; and

(*15*) "Superintendent of Insurance" means the officer, who shall be a qualified actuary, appointed by the Central Government to perform the duties of the Superintendent of Insurance under this Act.

Notes.—Cl. 15. The administration of the Act is to be carried out through the Superintendent of Insurance who will normally be the Government Actuary.

PART II.

PROVISIONS APPLICABLE TO INSURERS.

Registration.

3. (*1*) No insurer shall, after the commencement of this Act, begin to carry on any class of insurance business in British India, and no insurer carrying on any class of insurance business in British India shall, after the expiry of three months from the commencement of this Act, continue to carry on any such business, unless he has obtained from the Superintendent of Insurance a certificate of registration.

(*2*) Every application for registration shall be accompanied by—

(*a*) a certified copy of the memorandum and articles of association, where the applicant is a company and incorporated under the Indian Companies Act, 7 of 1913; or, in the case of any other insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2, a certified copy of the deed of partnership or of the deed of constitution of the company, as the case may be, or, in the case of an insurer having his principal place of business or domicile outside British India, the document specified in clause (*a*) of section 63;

(*b*) the name, address and the occupation, if any, of the directors where the insurer is a company incorporated under the Indian Companies Act, 7 of 1913, and in the case of an insurer specified in sub-clause (*a*) (*ii*) of clause (*9*) of section 2 the names and addresses of the proprietors and of the manager in British India, and in any other case the full address of the principal office of the insurer in British India and the names of the directors and the manager at such office and the name and address of some one or more persons resident in British India authorized to accept any notice required to be served on the insurer;

(*c*) a statement of the class or classes of insurance business done or to be done, and a statement that the amount required to be deposited by section 7 or section 98 before application for registration is made has been deposited together with a certificate from the Reserve Bank of India showing the amount deposited;

(*d*) where the provisions of section 6 or section 97 apply, a declaration verified by an affidavit made by the principal officer of the insurer authorized in that behalf that the provisions of those sections as to working capital have been complied with;

(*e*) in the case of an insurer having his principal place of business or domicile outside British India, a statement verified by an affidavit made by the principal officer of the insurer setting forth the requirements (if any) not applicable to nationals of the country in which such insurer is constituted, incorporated or domiciled which are imposed by the laws or practice of that country upon Indian nationals as a condition of carrying on insurance business in that country;

(*f*) a certified copy of the published prospectus, if any, and of the standard policy forms of the insurer and statements of the assured rates, advantages, terms and conditions to be offered in connection with insurance policies together with a certificate in connection with life insurance business by an actuary that such rates, advantages, terms and conditions are workable and sound :

Provided that in the case of marine, accident and miscellaneous insurance business other than workmen's compensation and motor car insurance, the above require-

ments regarding prospectus, forms and statements shall be complied with only in so far as the prospectus, forms and statements may be available; and

(*g*) the prescribed fee for registration being not more than one hundred rupees for each class of business.

(*3*) In the case of any insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance shall withhold registration or shall cancel a registration already made, if he is satisfied that in the country in which such insurer has his principal place of business or domicile Indian nationals are debarred by the law or practice of the country relating to, or applied to, insurance from carrying on the business of insurance, or that any requirement imposed on such insurer under the provisions of section 62 is not satisfied.

(*4*) In the case of any insurer the Superintendent of Insurance shall cancel a registration already made if the insurer fails to comply with the provision of section 7 or section 98 as to deposits.

(*5*) When the Superintendent of Insurance withholds or cancels any registration under sub-section (*3*) or sub-section (*4*) he shall give notice in writing to the insurer of his decision, and the decision shall take effect on such date as he may specify in that behalf in the notice, such date not being less than one month nor more than two months from the date of the receipt of the notice in the ordinary course of transmission.

(*6*) The Superintendent of Insurance shall, on being satisfied that the applicant has fulfilled all the requirements of the Act applicable to him, grant the insurer a certificate of registration.

Notes. — Under Cl. (3) of the original bill the Governor-General was given a discretion to take action or refrain from doing so. The Select Committee suggested that it should be made compulsory for the Superintendent to cancel or withhold registration if the conditions are satisfied. And this has been incorporated in the Act. Cl. (5) also was added at their suggestion. Transacting insurance business in contravention of this section is made punishable. (See section 103).

Minimum limit for annuities and other benefits secured by policies of life insurance.

4. (*1*) No insurer, not being a provident society to which Part III, or a Co-operative Life Insurance Society or a Mutual Insurance Company to which Part IV, of this Act applies, shall pay or undertake to pay on any policy of life insurance issued after the commencement of this Act an annuity of fifty rupees or less or a gross sum of rupees five hundred or less exclusive of any profit or bonus provided that this shall not prevent an insurer from converting any policy into a paid up policy of any value or payment of surrender value of any amount.

(*2*) Nothing contained in this section shall apply to group policies, that is to say, policies in respect of a group of persons engaged in the same occupation or kindred occupations under a single employer, for an aggregate sum of not less than rupees five thousand, under which an insurer pays or undertakes to pay a gross sum of rupees five hundred or less on an individual life.

Restriction on name of insurer.

5. (*1*) An insurer shall not be registered by a name identical with that by which an insurer in existence is already registered, or so nearly resembling that name as to be calculated to deceive except when the insurer in existence is in the course of being dissolved and signifies his consent to the Superintendent of Insurance.

(*2*) If an insurer, through inadvertence or otherwise, is without such consent as aforesaid registered by a name identical with that by which an insurer already in existence whether previously registered or not is carrying on business or so nearly resembling it as to be calculated to deceive, the first-mentioned insurer shall, if called upon to do so by the Superintendent of Insurance on the application of the second-mentioned insurer, change his name within a time to be fixed by the Superintendent of Insurance :

Provided that nothing in this section shall apply to any insurer carrying on business before the 27th day of January, 1937, under the Indian Life Assurance Companies Act, 6 of 1912.

(*3*) No insurer other than a provident society to which Part III applies, who begins to carry on insurance business after the commencement of this Act, shall adopt as its name and no such insurer carrying on business before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name any combination of words which includes the word "provident".

6. No insurer incorporated after, or who commenced carrying on the business of life insurance in British India, whether solely or in common with any other business, after the 26th day of January 1937, shall be registered unless he has as working capital a net sum of not less than fifty thousand rupees exclusive of the deposit to be made before registration under sub-section (5) of section 7 of this Act, and exclusive in the case of a company of any sums payable as preliminary expenses in the formation of the company.

Requirements as to capital.

Notes: The Central Government is given power to exempt any insurer constituted, incorporated or domiciled in an Indian State from the provisions of this section relating to deposits. (See Section 116).

7. (1) Every insurer not being an insurer specified in sub-clause (c) of clause (9) of S. 2 shall, in respect of the insurance business carried on by him in British India, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government cash or approved securities, estimated at the market value of the securities on the day of deposit, of the amount hereafter specified, namely :

Deposits.

(a) where the business done or to be done is life insurance only, two hundred thousand rupees ;

(b) where the business done or to be done is fire insurance only, one hundred and fifty thousand rupees ;

(c) where the business done or to be done is marine insurance only, one hundred and fifty thousand rupees ;

(d) where the business done or to be done is accident and miscellaneous insurance including workmen's compensation, and motor car insurance, one hundred and fifty thousand rupees ;

(e) where the business done or to be done includes life insurance and any one of the three classes specified in clauses (b), (c) and (d), three hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;

(f) where the business done or to be done includes life insurance and any two of the three classes specified in clauses (b), (c) and (d), four hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;

(g) where the business done or to be done includes life insurance and all three classes specified in clauses (b), (c) and (d), four hundred and fifty thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business ;

(h) where the business done or to be done does not include life insurance but includes any two of the classes specified in clauses (b), (c) and (d), two hundred and fifty thousand rupees ;

(i) where the business done or to be done does not include life insurance but includes all three classes specified in clauses (b), (c) and (d), three hundred and fifty thousand rupees ; and

(j) where the business done or to be done is marine insurance relating to country craft or its cargo, ten thousand rupees only.

(2) Where the insurer is an insurer specified in sub-clause (c) of clause (9) of section 2, he shall be deemed to have complied with the provisions of this section as to deposits, if in respect of any class of insurance business transacted by him in British India under a standing contract of the nature referred to in sub-clause (c) of clause (9) of section 2 a deposit of an amount one-and-a-half times that specified in sub-section (1) as the deposit for that class of insurance business has been made in the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government in cash or approved securities estimated at the market value of the securities on the day of deposit by or on behalf of the underwriters who are members of the Society of Lloyds with whom he has his standing contract.

(3) Where the deposit is to be made by an insurer incorporated before, or carrying on the business of insurance in British India before, the 27th day of January, 1937, the deposit referred to in sub-section (1) may be made in not more than seven instalments, of which the first shall be not less than one-fourth of the total amount of the deposit and shall be paid before the application for registration is made, the second shall be not less than one-sixth of the balance of the deposit and shall be paid before the 1st day of January, 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment and shall be paid before the 1st day of January of each succeeding year.

Provided that in the case of insurers carrying on life insurance business only, the deposit may be made in not more than ten instalments, of which the first shall be not less than one-fourth of the total amount of the deposit, and shall be paid before the application for registration is made, the second shall be not less than one-ninth of the balance of the deposit, and shall be paid before the 1st day of January, 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment, and shall be paid before the 1st day of January of each succeeding year.

(*4*) Notwithstanding anything contained in sub-section (*3*), in the case of an insurer not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit referred to in sub-section (*1*) shall be made in two instalments of which the first shall be not less than one half of the total amount of the deposit and shall be made before the application for registration is made, and the second shall be made before the expiry of one year from the date of registration.

(*5*) Where the deposit is to be made by an insurer neither incorporated before, nor carrying on insurance business in British India before, the 27th day of January, 1937, the deposit may be made in instalments of not less than one-fourth the total amount before the application for registration is made, not less than one-third the balance before the expiry of one year from the commencement of business in British India and not less than one-half the residue before the expiry of two years from the commencement of business in British India, and the balance before the expiry of three years from the commencement of business in British India:

Provided that in the case of any insurer not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit shall be made in full before the application for registration is made.

(*6*) No class of insurance business in addition to the class or classes in respect of which an insurer is already liable to make a deposit under sub-section (*1*) or sub-section (*2*) shall be undertaken by the insurer until the deposit to which he is already liable has been made in full, and the additional deposit required in respect of the additional class of business or so much thereof as under the provisions of sub-section (*3*), (*4*) or (*5*) is to be made before the application for registration, has also been made in full.

(*7*) Securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 6 of 1912, shall be transferred by him to the Reserve Bank of India and shall, to the extent of their market value on the day of the first deposit made in compliance with this Act, be deemed to be deposited under this Act in respect of the life insurance business of the insurer.

(*8*) A deposit made in cash shall be held by the Reserve Bank of India to the credit of the insurer and shall be returnable to the insurer in cash in any case in which under the provisions of this Act a deposit is to be returned; and any interest accruing due and collected on securities deposited under sub-section (*1*) or sub-section (*2*) shall be paid to the insurer, subject only to deduction of the normal commission chargeable for the realization of interest.

(*9*) The insurer may at any time substitute for securities lodged with the Bank under this section other approved securities of equal value at the market rate prevailing at the time of substitution, and the Reserve Bank of India shall, if so requested by a depositor, invest in approved securities the whole or any part of a deposit made originally in cash or the whole or any part of cash received by the Bank on sale of or on the maturing of securities lodged by the depositor.

(*10*) If any part of a deposit made under this section is used in the discharge of any liability of the insurer, the insurer shall deposit such additional sum in cash or approved securities as will make up the amount so used. The insurer shall be deemed to have failed to comply with the requirements of sub-section (*1*), unless the deficiency supplied within a period of two months from the date when the deposit or any part thereof is so used for discharge of liabilities.

Notes.—For penalty for transacting business in contravention of Ss. 6 and 7, see Section 103.

Reservation of deposits.

8. (*1*) Any deposit made under section 7 shall be deemed to be part of the assets of the insurer but shall not be susceptible of

any assignment or charge; nor shall it be available for the discharge of any liability of the insurer other than liabilities arising out of policies of insurance issued by the insurer so long as any such liabilities remain undischarged; nor shall it be liable to attachment in execution of any decree except a decree obtained by a policy-holder of the insurer in respect of a debt due upon a policy which debt the policy-holder has failed to realize in any other way.

(2) Where a deposit is made in respect of life insurance business the deposit made in respect thereof shall not be available for the discharge of any liability of the insurer other than liabilities arising out of policies of life insurance issued by the insurer.

Refund of deposits.

9. Where an insurer has ceased to carry on in British India any class of insurance business in respect of which a deposit has been made under section 7 and his liabilities in British India in respect of business of that class have been satisfied or are otherwise provided for, the Court may, on the application of the insurer, order the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which he continues to carry on.

Separation of accounts and funds.

10. (1) Where the insurer carries on business of more than one of the classes specified in clauses (*a*), (*b*), (*c*) and (*d*) of sub-section (1) of section 7, he shall keep a separate account of all receipts and payments in respect of each such class of insurance business.

(2) Where the insurer carries on the business of life insurance, the excess of receipts over payments in respect of such business shall be carried to and shall form a separate fund to be called the life insurance fund and the deposit made by the insurer in respect of life insurance business shall be deemed to be part of such fund.

(3) The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly save as provided in section 49 for any purposes other than those of life insurance.

Accounts and balance-sheet.

11. (1) Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall at the expiration of each calendar year prepare with reference to that year—

(*a*) in accordance with the regulations contained in Part I of the First Schedule, a balance-sheet in the form set forth in Part II of that Schedule;

(*b*) in accordance with the regulations contained in Part I of the Second Schedule, a profit and loss account in the forms set forth in Part II of that Schedule, except where the insurer carries on business of one class only of the classes specified in clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 7 and no other business;

(*c*) in respect of each class of insurance business carried on by him in accordance with the regulations contained in Part I of the Third Schedule, a revenue account in the form or forms set forth in Part II of that Schedule applicable to that class of insurance business.

(2) Unless the insurer is a company to which the Indian Companies Act, 7 of 1913, applies, the accounts and statements referred to in sub-section (1) shall be signed by the insurer, or in the case of a company by the chairman, if any, and two directors and the principal officer of the company, or in the case of a firm by two partners of the firm, and shall be accompanied by a statement containing the names and descriptions of the persons in charge of the management of the business during the period to which such accounts and statements refer and by a report by such persons on the affairs of the business during that period.

(3) Where an insurer carrying on the business of insurance at the commencement of this Act has prepared the balance-sheet and accounts required by the Indian Life Assurance Companies Act, 6 of 1912, or has based his accounts upon the financial and not the calendar year, the provisions of this section shall, if the Central Government so directs in any case, apply until

the 31st day of December 1939, as if in sub-section (*1*) references to the calendar year were references to the financial year.

Audit.

12. The balance-sheet, profit and loss account, revenue account and profit and loss appropriation account of every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall, unless they are subject to audit under the Indian Companies Act, 7 of 1913, be audited annually by an auditor, and the auditor shall in the audit of all such accounts have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities and penalties imposed on, auditors of companies by section 145 of the Indian Companies Act, 7 of 1913.

Actuarial report and abstract.

13. (*1*) Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India, and also in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2 in respect of all life insurance business transacted by him, once at least in every five years cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule.

(*2*) The provisions of sub-section (*1*) regarding the making of an abstract shall apply whenever at any other time an investigation into the financial condition of the insurer is made with a view to the distribution of profits or an investigation is made of which the results are made public.

(*3*) There shall be appended to every such abstract as is referred to in sub-section (*1*) or sub-section (*2*) a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(*4*) There shall be appended to every such abstract a statement, in conformity with the requirements of Part II of the Fifth Schedule and prepared in accordance with the regulations contained in Part I of that Schedule, of the life insurance business in force at the date to which the accounts of the insurer are made up for the purposes of such abstract :

Provided that, if the investigation referred to in sub-sections (*1*) and (*2*) is made annually by any insurer, the statement need not be appended every year but shall be appended at least once in every five years.

(*5*) Where an investigation into the financial condition of an insurer is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance-sheet as at the date at which the investigation is made shall be prepared and audited in the manner provided by this Act.

Register of policies and register of claims.

14. Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2 in respect of all business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall maintain—

(*a*) a register or record of policies, in which shall be entered, in respect of every policy issued by the insurer, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice, and

(*b*) a register or record of claims, in which shall be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or, in the case of a claim which is rejected, the date of rejection and the grounds therefor.

Submission of returns.

15. (*1*) The audited accounts and statements referred to in section 11 and the abstract and statement referred to in section 13 shall be printed, and four copies thereof shall be furnished as returns to the Superintendent of Insurance within six months from the end of the period to which they refer. The Superintendent of Insurance

may extend the time allowed for furnishing the abstract and statement referred to in section 13 by a period not exceeding three months :

Provided that the said period of six months shall in the case of insurers having their principal place of business or domicile outside India and in the case of insurers constituted, incorported or domiciled in British India but also carrying on business outside India be extended by three months, and provided further that the Central Government may in any case extend the time allowed by this sub-section for the furnishing of such returns by a further period not exceeding three months.

(2) Of the four copies so furnished one shall be signed in the case of a company by the chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual, by the insurer himself.

(3) Where the insurer's principal place of business or domicile is outside British India, he shall forward to the Superintendent of Insurance, along with the documents referred to in section 11, the balance-sheet, profit and loss account and revenue account and the valuation reports and valuation statements, if any, which the insurer is required to file with the public authority of the country in which the insurer is constituted, incorported or domiciled, or, where such documents are not required to be filed, a certified statement showing the total assets and liabilities of the insurer at the close of the period covered by the said documents and his total income and expenditure during that period.

Returns by insurers established outside British India.

16. (1) Where by the law of the country in which an insurer, not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, is constituted, incorported or domiciled, the insurer is required to prepare and to furnish to a public authority of that country documents of substantially the same nature as the documents required to be furnished as returns in accordance with the provisions of section 15, the provisions of sub-section (2) of this section shall apply to such insurer in lieu of the provisions of sections 11, 12, 13 and 15.

(2) The insurer shall, within the time specified in sub-section (1) of section 15, furnish to the Superintendent of Insurance four certified copies in the English language of every balance-sheet, account, abstract, report and statement supplied to the public authority referred to in sub-section (1) of this section, and, in addition thereto, four copies in the English language of each of the following statements, namely :—

(*a*) a statement showing the assets held by the insurer in India,

(*b*) for each class of insurance business carried on by him, a revenue account in the form or forms set forth in Part II of the Third Schedule applicable to that class of business, showing separately with respect to business transacted by the insurer in India the details required to be supplied in a revenue account furnished under this clause of this sub-section,

(*c*) an abstract of the valuation report in respect of all life insurance business transacted by the insurer in India, prepared in the manner required by sub-section (1) of section 13, and

(*d*) a declaration in the prescribed form stating that all amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India have been shown in the revenue account except such sums as properly appertain to the capital account.

Exemption from certain provisions of the Indian Companies Act, 1913.

17. Where an insurer, being a company incorporated under the Indian Companies Act, 7 of 1913, in any year furnishes his accounts and balance-sheet in accordance with provisions of section 15, he may at the same time send to the Registrar of Companies a copy of such accounts and balance-sheet; and where such copy is so sent it shall not be necessary for the company to file a balance-sheet with the Registrar as required by sub-section (1) of section 134 of that Act and the copy of the accounts and balance-sheet so sent shall be dealt with in all respects as if they were filed in accordance with that section.

Furnishing reports.

18. Every insurer shall furnish to the Superintendent of Insurance a certified copy of every report on the affairs of the concern which is submitted to the members

or policy-holders of the insurer immediately after its submission to the members or policy-holders, as the case may be.

Abstract of proceedings of general meetings.

19. Every insurer, being a company or body incorporated under any law for the time being in force in British India, shall furnish to the Superintendent of Insurance an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates.

Custody and inspection of documents and supply of copies.

20. (*1*) Every return furnished to the Superintendent of Insurance or a certified copy thereof shall be kept by the Superintendent and shall be open to inspection; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words or fractional part thereof required to be copied, any five figures being deemed equivalent to one word.

(*2*) A printed or certified copy of the accounts, statements and abstract furnished in accordance with the provisions of section 15 or section 16 shall, on the application of any shareholder or policy-holder made at any time within two years from the date on which the document was so furnished, be supplied to him by the insurer within fourteen days when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application.

(*3*) A copy of the memorandum and articles of association of the insurer if a company shall on the application of any policy-holder be supplied to him by the insurer on payment of one rupee.

Powers of Superintendent of Insurance regarding returns.

21. (*1*) If it appears to the Superintendent of Insurance that any return furnished to him under the provisions of this Act is inaccurate or defective in any respect, he may—

(*a*) require from the insurer such further information, certified if he so directs by an auditor or actuary, as he may consider necessary to correct or supplement such return;

(*b*) call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose;

(*c*) examine any officer of the insurer on oath in relation to the return;

(*d*) decline to accept any such return unless the inaccuracy has been corrected or the deficiency has been supplied before the expiry of one month from the date on which the requisition asking for correction of the inaccuracy or supply of the deficiency was delivered to the insurer and if he declines to accept any such return, the insurer shall be deemed to have failed to comply with the provisions of section 15 or section 16 relating to the furnishing of returns.

(*2*) The Court may on the application of an insurer and after hearing the Superintendent cancel any order made by the Superintendent under clause (a), (b) or (c) of sub-section (1) or may direct the acceptance of any return which the Superintendent has declined to accept, if the insurer satisfies the Court that the action of the Superintendent was in the circumstances unreasonable.

Power of Superintendent of Insurance to order revaluation.

22. If it appears to the Superintendent of Insurance that an investigation or valuation to which section 13 refers does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent of Insurance.

Notes.—The provision for giving notice to the insurer has been included on the suggestion of the Select Committee.

Evidence of documents.

23. (*1*) Every return furnished to the Superintendent of Insurance, which has been certified by the Superintendent to be a return so furnished, shall be deemed to be a return so furnished.

(*2*) Every document, purporting to be certified by the Superintendent of Insurance to be a copy of a return so furnished, shall be deemed to be a copy of that return and shall be received in evidence as if it were the original return, unless some variation between it and the original return is proved.

Summary of returns to be published.

24. The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished to the Superintendent of Insurance for the year preceding the year of publication and may append to such summary any note of the Central Government and any correspondence in relation thereto.

Returns to be published in statutory forms.

25. No insurer shall publish in British India any return in a form other than that in which it has been furnished to the Superintendent of Insurance:

Provided that nothing contained in this section shall prevent an insurer from publishing a true and accurate abstract from such returns for the purposes of publicity.

Alterations in the particulars furnished with application for registration to be reported.

26. Whenever any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 3 to accompany an application by an insurer for registration, the insurer shall forthwith furnish to the Superintendent of Insurance full particulars of such alteration.

INVESTMENT, LOANS AND MANAGEMENT.

Investment of assets and restriction on loans.

27. (*1*) Every insurer incorporated or domiciled in British India shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than fifty-five per cent. of the sum of the amount of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer for loans granted by him on policies of life insurance, in the manner following, namely, twenty-five per cent. of the said sum in Government securities and a further sum equal to not less than thirty per cent. of the said sum in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

Explanation.—The provisions of this sub-section shall apply also to insurers incorporated in or domiciled in the United Kingdom.

(*2*) An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom shall, subject to the provisions of sub section (3), at all times invest and hold invested assets equivalent to not less than the sum of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer on loans granted by him on policies of life insurance in the manner following, namely thirty-three and one-third per cent. of the said sum in Government securities, and the balance in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

(*3*) An insurer carrying on business at the commencement of this Act to whom sub-section (1) or sub-section (2) applies shall before the expiry of four years from the commencement of this Act invest the total amount required to be invested by those sub-sections in the manner required thereby:

Provided that of such total amount the insurer shall have invested not less than one-fourth in securities of the nature specified in sub-section (1) before the expiry of one year, not less than one-half before the expiry of two years, and not less than three-fourths before the expiry of three years from the commencement of this Act.

(*4*) The assets required by this section to be held invested by an insurer to whom sub-section (2) applies shall be held in trust for the discharge of claims of the nature referred to in sub-section (2) and shall be vested in trustees resident in British India and approved by the Central Government by an instrument of trust which shall be executed by the insurer and approved by the Central Government and shall define the manner in which alone the subject matter of the trust shall be dealt with.

Explanation. — Sub-ss. (*2*) and (*4*) shall apply to an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose Governing Body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom.

Statement of investments of assets.

28. (*1*) Every insurer registered under this Act carrying on the business of life insurance, not being a provident society, shall twice in every year, namely within fourteen days of the 30th day of June and within fourteen days of the 31st day of December, submit to the superintendent of Insurance a statement showing as at the said dates the assets held invested in accordance with section 27 and such statement shall be certified by the principal officer of the insurer.

(*2*) The Superintendent of Insurance shall be entitled at any time to take such steps as he may consider necessary for the inspection or verification of the assets invested in compliance with section 27 and the insurer shall comply with all requisitions made by the Superintendent in that behalf.

Prohibition of loans.

29. No insurer shall grant loans or temporary advances either on hypothecation of property or on personal security or otherwise, except loans on life policies issued by him within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer if a company, or where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, officer or partner holds the position of a director, manager, managing agent, actuary, officer or partner :

Provided that nothing herein contained shall apply to loans made by an insurer to a banking company :

Provided further that every existing loan to any director, manager, managing agent, auditor, actuary, officer or partner, notwithstanding any contract to the contrary, shall be repaid within one year from the commencement of this Act, and in case of default, such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of one year from the commencement of this Act :

Provided further that nothing in this section shall prohibit a company from granting such loans or advances to a subsidiary company or to any other company of which the company granting the loan or advance is a subsidiary company.

Liability of directors, etc., for loss due to contraventions of Ss. 27 and 29.

30. If by reason of a contravention of any of the provisions of section 27 or section 29, any loss is sustained by the insurer or by the policyholders, every director, manager, managing agent, officer or partner who is knowingly a party to such contravention shall, without prejudice to any other penalty to which he may be liable under this Act, be jointly and severally liable to make good the amount of such loss.

Assets of insurer how to be kept.

31. None of the assets in British India of any insurer shall, except in the case of deposits made with the Reserve Bank of India under section 7 or in so far as assets are required to be vested in trustees by sub-section (*4*) of section 27, be kept otherwise than in the corporate name of the undertaking, if a company, or in the name of the partners, if a firm, or in the name of the proprietor, if an individual.

Limitation on employment of managing agents and on the remuneration payable to them.

32. (*1*) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business.

(*2*) Where any insurer engaged in the business of insurance before the commencement of this Act employs a managing agent for the conduct of business, then, notwithstanding anything to the contrary contained in the Indian Companies Act, 7 of 1913, and notwithstanding anything to the contrary contained in the articles of the insurer, if a company, or in any agreement entered into by the insurer, such managing agent shall cease to hold office on the expiry of three years from the commencement of this Act and no compensation shall be payable to him by the insurer by reason only of the premature termination of his employment as managing agent.

(3) After the commencement of this Act, notwithstanding anything contained in the Indian Companies Act, 7 of 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the articles of association of an insurer being a company, no insurer shall pay to a managing agent and no managing agent shall accept from an insurer as remuneration for his services as managing agent more than two thousand rupees per month in all, including salary and commission and other remuneration payable to and receivable by him, for his services as managing agent.

INSPECTION.

Power of Superintendent of Insurance to order inspection.

33. (1) If the Superintendent of Insurance has reason to believe that the interests of the policy-holders of an insurer are in danger or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of this Act, or that an offence under this Act has been or is likely to be committed by an insurer or any officer of an insurer or if he receives a requisition in this behalf signed by shareholders of an insurer being a company not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity to be heard, appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, or may himself make such investigation.

(2) The Court may, on the application of an insurer and after giving notice to and hearing the Superintendent of Insurance, forbid such action by the Superintendent, if the insurer satisfies the Court that it is unnecessary in the circumstances.

(3) The results of any investigation made under this section shall be embodied in a report of which one copy shall be lodged with the Superintendent of Insurance and one copy shall be furnished to the insurer; and a copy of such report shall be furnished to the policy-holders who have sent a requisition for such an investigation.

(4) The Superintendent of Insurance may require the insurer to comply within a time to be specified by him (not being less than fifteen days from the receipt of the notice by the insurer) with any directions he may issue to remedy defects disclosed by such inspection.

(5) If, as a result of any investigation made under this section, the Superintendent of Insurance is of opinion that it is necessary in the interests of the policy-holders that the business of the insurer should be wound up, or if the insurer fails to comply with any directions issued under sub-section (4), the Superintendent may, after giving notice to the insurer and giving him an opportunity to be heard, apply to the Court to have the business of the insurer wound up.

Powers of investigator.

34. When any investigation is made in pursuance of section 33 the provisions of section 140 of the Indian Companies Act, 7 of 1913, shall apply for the purposes of such investigation as they apply to an investigation made in pursuance of section 138 of that Act, and all expenses of and incidental to such investigation shall be defrayed by the insurer.

AMALGAMATION AND TRANSFER OF INSURANCE BUSINESS.

Amalgamation and transfer of insurance business.

35. (1) No life insurance business of an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2 shall be transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Court having jurisdiction over one or other of the insurers concerned.

(2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions as may be necessary for giving effect to the scheme.

(3) Before an application is made to the Court to sanction any such scheme, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case

may be, and of the reason therefor shall, at least two months before the application is made, be sent to the Central Government, and certified copies of the following documents shall be furnished to the Central Government and shall during the two months aforesaid be kept open for the inspection of the members and policyholders at the principal and branch offices and chief agencies of the insurers concerned, namely:—

(*a*) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer;

(*b*) statements of the assets and liabilities of the insurers concerned in such amalgamation or transfer; and

(*c*) the actuarial or other reports on which the scheme was founded including a report by an independent actuary on the proposed amalgamation or transfer.

(*4*) Where an application under sub-section (*3*) is made to the Court within three months from the commencement of this Act, the Court may, on application, extend for the insurer whose business is to be transferred to or amalgamated with the business of another insurer, the time allowed for registration and for the payment of the first instalment of the deposit under sections 3 and 7 for such period not exceeding nine months as the Court may think fit.

Sanction of amalgamation and transfer by Court.

36. When any application such as is referred to in sub-section (*3*) of section 35 is made to the Court, the Court shall cause, if for special reasons it so directs, notice of the application to be sent to every person resident in British India or in an Indian State who is the holder of a life policy of any insurer concerned and shall cause a statement of the nature and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct, and, after hearing the directors and such policyholders as apply to be heard and any other persons whom it considers entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established.

Statements required after amalgamation and transfer.

37. Where an amalgamation takes place between any two or more insurers, or where any business of one insurer is transferred to another, whether in accordance with a scheme confirmed by the Court or otherwise, the insurer carrying on the amalgamated business or the insurer to whom the business is transferred, as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, furnish to the Central Government—

(*a*) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and

(*b*) a declaration signed by every insurer concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

(*c*) where the amalgamation or transfer has not been made in accordance with a scheme confirmed by the Court—

(*i*) certified copies of statements of the assets and liabilities of the insurers concerned, and

(*ii*) certified copies of the actuarial or other reports upon which the agreement or deed was founded.

ASSIGNMENT OR TRANSFER OF POLICIES AND NOMINATIONS.

Assignment and transfer of life insurance policies.

38. (*1*) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(*2*) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment has been delivered to the insurer at his principal

place of business in British India by or on behalf of the transferor or transferee.

(3) The date on which the notice referred to in sub-s. (2) is delivered to the insurer shall regulate the priority of all claims under a transfer or assignment as between persons interested in the policy; and where there is more than one instrument of transfer or assignment the priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-section (2) are delivered.

(4) Upon the receipt of the notice referred to in sub-s. (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice; and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) From the date of the receipt of the notice referred to in sub-s. (2) the insurer shall recognize the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) The rights and remedies of the assignee or transferee of a policy of life insurance existing prior to the commencement of this Act shall not be affected by the provisions of this section.

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policy-holder, and an assignment in favour of the survivor or survivors of a number of persons, shall be valid.

Nomination by policy-holder.

39. (1) The holder of a policy of life insurance may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be.

(3) The insurer may charge a fee not exceeding one rupee for registering any such endorsement and shall furnish to the policy-holder a written acknowledgment of having done so.

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination.

(5) Where the policy matures for payment during the lifetime of the policy-holder or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the policy-holder, the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 3 of 1874, applies.

Notes.— By Cl. (7) insurances by a married man for the benefit of his wife or children have been excluded from the operation of this section.

COMMISSION AND REBATES AND LICENSING OF AGENTS.

Prohibition of payment by way of commission or otherwise for procuring business.

40. (1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent licensed under section 42 or a person acting on behalf of an insurer who for the

purposes of insurance business employs licensed insurance agents.

(*2*) No insurance agent licensed under section 42 shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of life insurance business, forty per cent. of the first year's premium payable on any policy or policies effected through him and five per cent. of a renewal premium, or, in the case of business of any other class, fifteen per cent. of the premium :

Provided that insurers, in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent. of the first year's premium payable on any policy or policies effected through them and six per cent. of the renewal premiums.

(*3*) Nothing in this section shall prevent the payment under any contract existing prior to 27th January 1937, of gratuities or renewal commission to an insurance agent or to his representatives after his decease in respect of insurance business effected through him before the said date.

Notes.—The amount of commission or remuneration payable to insurance agents has been limited in order to avoid the unhealthy competition among the companies.

Prohibition of rebates.

41. (*1*) No person shall allow or offer to allow, either directly or indirectly, as an inducement to any person to effect or renew an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy nor shall any person taking out or renewing a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer.

(*2*) Any person making default in complying with the provisions of this section shall be punishable with fine which may extend to one hundred rupees, unless the default is made by a person effecting or renewing a policy, in which case he shall be punishable with fine which may extend to fifty rupees only.

Licensing of insurance agents.

42. (*1*) The Superintendent of Insurance or an officer authorised by him in this behalf shall, in the prescribed manner and on payment of the prescribed fee which shall not be more than one rupee, issue to any individual making an application under this section and not suffering from any of the disqualifications hereinafter mentioned a licence to act as an insurance agent for the purpose of soliciting or procuring insurance business.

(*2*) A licence issued under this section shall entitle the holder to act as an insurance agent for any registered insurer.

(*3*) A licence issued under this section shall expire on the 31st day of March in each year, but shall, if the applicant does not suffer from any of the disqualifications hereinafter mentioned, be renewed from year to year on payment of a fee of one rupee.

(*4*) The disqualifications above referred to shall be the following :

(*a*) that the person is a minor;

(*b*) that he is found to be of unsound mind by a Court of competent jurisdiction;

(*c*) that he has been found guilty of criminal misappropriation or criminal breach of trust or cheating by a Court of competent jurisdiction;

(*d*) that in the course of any judicial proceeding relating to any policy of insurance or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he has been guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.

(*5*) If it be found that an insurance agent suffers from any of the foregoing disqualifications, without prejudice to any other penalty to which he may be liable, the Superintendent of Insurance shall and if the agent has knowingly contravened any provision of this Act, may cancel the licence issued to the agent under this section.

Register of insurance agents.

43. (*1*) Every insurer and every person who acting on behalf of an insurer employs licensed insurance agents shall maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased.

(*2*) Any individual not holding a licence issued under section 42 who acts as an insurance agent shall be punishable with fine which may extend to fifty rupees, and any insurer who, or any person acting on

behalf of an insurer who, appoints as an insurance agent any individual not so licensed, or transacts any insurance business in India through any such individual, shall be punishable with fine which may extend to one hundred rupees.

(3) The provisions of sub-section (2) shall not take effect until the expiry of six months from the commencement of this Act.

Notes.—The penalty in the case of agents acting without licence has been reduced on the recommendation of the Select Committee from Rs. 100, which was in the original Bill, to Rs. 50.

Prohibition of cessation of payments of commission.

44. Notwithstanding anything to the contrary in a contract between any person and an insurance agent licensed under section 42 forfeiting or stopping payment of renewal commission to such insurance agent, no such person shall in respect of life insurance business done in India refuse payment to an insurance agent of commission on renewal premiums due to him under the agreement by reason only of the termination of his agreement except for fraud :

Provided that such agent has served such person continually and exclusively for at least ten years, and provided further that, after his ceasing to act as agent he does not directly or indirectly solicit or procure insurance business for any other person.

SPECIAL PROVISIONS OF LAW.

Policy not to be called in question on ground of misstatement after two years.

45. No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy holder and that the policyholder knew at the time of making it that the statement was false.

Notes.—This section has been inserted to check the abuse of insurers questioning the validity of a policy on which premiums have been paid for a considerable number of years on the ground that some statement leading to the issue of the policy was untrue. Of course it retains the right of the insurer to show that the false statement was fraudulently made with knowledge and concerned with a material matter.

Application of British Indian law to policies issued in British India.

46. The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to receive payment in British India of any sum secured thereby and to sue for any relief in respect of the policy in any Court of competent jurisdiction in British India; and if the suit is brought in British India any question of law arising in connection with any such policy shall be determined according to the law in force in British India.

Payment of money into Court.

47. (1) Where in respect of any policy of life insurance maturing for payment an insurer is of opinion that by reason of conflicting claims to or insufficiency of proof of title to the amount secured thereby or for any other adequate reason it is impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, the insurer shall before the expiry of nine months from the date of the maturing of the policy apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.

(2) A receipt granted by the Court for any such payment shall be a satisfactory discharge to the insurer for the payment of such amount.

(3) An application for permission to make a payment into Court under this section shall be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars, namely :—

(a) the name of the insured person and his address;

(b) if the insured person is deceased, the date and place of his death :

(c) the nature of the policy and the amount secured by it;

(d) the name and address of each claimant so far as is known to the insurer;

with details of every notice of claim received ;

(*e*) the reasons why in the opinion of of the insurer a satisfactory discharge cannot be obtained for the payment of the amount ; and

(*f*) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into Court.

(*4*) An application under this section shall not be entertained by the Court if the application is made before the expiry of six months from the death of the insured, or the maturing of the policy by survival.

(*5*) If it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it shall allow the amount to be paid into Court and shall invest the amount in Government securities pending its disposal.

(*6*) The insurer shall transmit to the Court every notice of claim received after the making of the application under sub-section (*3*), and any payment required by the Court as costs of the proceedings or otherwise in connection with the disposal of the amount paid into Court shall as to the costs of the application under sub-section (*3*) be borne by the insurer and as to any other costs be in the discretion of the Court.

(*7*) The Court shall cause notice to be given to every ascertained claimant of the fact that the amount has been paid into Court, and shall cause notice at the cost of any claimant applying to withdraw the amount to be given to every other ascertained claimant.

(*8*) The Court shall decide all questions relating to the disposal of claims to the amount paid into Court.

Directors of insurers being companies.

48. (*1*) Where the insurer is a company incorporated under the Indian Companies Act, 7 of 1913, and carries on the business of life insurance, not less than one-fourth of the whole number of the directors of the company shall be persons having the prescribed qualifications and holding policies of life insurance issued by the company, and shall be elected to the Board of Directors of the company in the prescribed manner by the holders of policies of life insurance issued by the company.

(*2*) This section shall not take effect until the expiry of one year from the commencement of this Act.

Notes—This section gives a valuable right to the policy-holders in that they are entitled to elect at least one-fourth of the number of directors from among the policy-holders.

Restriction on dividends and bonuses.

49. No insurer, being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (*9*) of section 2, who carries on the business of life insurance shall in respect of such life insurance business declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer.

Notes — The object of this section is to check the practice of companies declaring indiscriminately bonuses and dividends without any regard to their assets and liabilities.

Notice of options available to the assured on the lapsing of a policy.

50. An insurer shall, within three months of the lapsing of a policy of life insurance, give notice to the policy-holder informing him of the options available to him.

Supply of copies of proposals and medical reports.

51. Every insurer shall, on application by a policy-holder and on payment of a fee not exceeding one rupee, supply to the policy-holder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith.

Prohibition of business on dividing principle.

52. No insurer shall after the commencement of this Act begin, or after three years from that date continue to carry on, any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits :

Provided that nothing in this section shall be deemed to prevent an insurer from allocating bonuses to holders of policies of life insurance as a result of a

periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses or otherwise :

Provided further that an insurer who continues to carry on insurance business on the dividing principle after the commencement of this Act shall withhold from distribution a sum of not less than forty per cent. of the premiums received during each year after the commencement of this Act in which such business is continued so as to make up the amount required for investment under section 27.

WINDING UP.

Winding up by the Court.

53. (*1*) The Court may order the winding up in accordance with the Indian Companies Act, 7 of 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this Chapter, apply accordingly.

(*2*) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—

(*a*) if with the sanction of the Court previously obtained a petition in this behalf is presented by shareholders not less in number than one tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees ; or

(*b*) if the Superintendent of Insurance, who is hereby authorised to do so, applies in this behalf to the Court on any of the following grounds, namely :

(*i*) that the company has failed to deposit or to keep deposited with the Reserve Bank of India the amounts required by section 7,

(*ii*) that the company having failed to comply with any requirement of this Act has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance,

(*iii*) that it appears from the returns furnished under the provisions of this Act or from the results of any investigation made thereunder that the company is insolvent, or

(*iv*) that the continuance of the company is prejudicial to the interests of the policy-holders.

Voluntary winding up.

54. Notwithstanding anything contained in the Indian Companies Act, 7 of 1913, an insurance company shall not be wound up voluntarily except for the purpose of effecting an amalgamation or a re-construction of the company, or on the ground that by reason of its liabilities it cannot continue its business.

Valuation of liabilities.

55. (*1*) In the winding up of an insurance company or in the insolvency of any other insurer the value of the assets and the liabilities of the insurer shall be ascertained in such manner and upon such basis as the liquidator or receiver in insolvency thinks fit, subject, so far as applicable, to the rule contained in the Sixth Schedule and to any directions which may be given by the Court.

(*2*) For the purposes of any reduction by the Court of the amount of the contracts of any insurance company the value of the assets and liabilities of the company and all claims in respect of policies issued by it shall be ascertained in such manner and upon such basis as the Court thinks proper having regard to the rule aforesaid.

(*3*) The rule in the Sixth Schedule shall be of the same force and may be repealed, altered or amended as if it were a rule made in pursuance of section 246 of the Indian Companies Act, 7 of 1913, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of insurance companies.

Application of surplus assets of life insurance fund in liquidation or insolvency.

56. (*1*) In the winding up of an insurance company and in the insolvency of any other insurer the value of the assets and the liabilities of the insurer in respect of life insurance business shall be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets shall be applied to the discharge of any liabilities other than those in respect of life insurance business except in so far as those assets exceed the liabilities in respect of life insurance business.

(2) In the winding up of an insurance company carrying on the business of life insurance or in the insolvency of any other insurer carrying on such business where any proportion of the profits of the insurer was before the commencement of the winding up or insolvency allocated to policy-holders, if when the assets and liabilities of the insurer have been ascertained, there is found to be a surplus of assets over liabilities (hereinafter referred to as a prima facie surplus) there shall be added to the liabilities of the insurer in respect of the life insurance business an amount equal to such proportion of the prima facie surplus as is equivalent to such proportion of the profits allocated to share-holders and policy-holders as was allocated to policy holders during the ten years immediately preceding the commencement of the winding up and the assets of the insurer shall be deemed to exceed his liabilities only in so far as those assets exceed those liabilities after such addition :

Provided that :—

(a) if in any case there has been no such allocation or if it appears to the Court that by reason of special circumstances it would be inequitable that the amount to be added to the liabilities of the insurer in respect of the life insurance business should be an amount equal to such proportion as aforesaid, the amount to be so added shall be such amount as the Court may direct, and

(b) for the purpose of the application of this sub-section to any case where before the commencement of the winding up or insolvency a proportion of such profits as aforesaid of a branch only of the life insurance business in question has been allocated to policy-holders, the value of the assets and liabilities of the insurer in respect of that branch shall be separately ascertained in like manner as the value of his assets and liabilities in respect of the life insurance business was ascertained, and the surplus so found, if any, of assets over liabilities shall, for the purpose of determining the amount to be added to the liabilities of the insurer in respect of the life insurance business be deemed to be the prima facie surplus.

Winding up of secondary companies.

57. (1) Where the insurance business or any part of the insurance business of an insurance company has been transferred to another insurance company under an arrangement in pursuance of which the first mentioned company (in this section referred to as the secondary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section referred to as the principal company) then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the secondary company to be wound up in conjunction with the principal company and may by the same or any subsequent order appoint the same person to be liquidator for the two companies and make provision for such other matters as may seem to the Court necessary with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the secondary company.

(3) In adjusting the rights and liabilities of the members of the several companies among themselves the Court shall have regard to the constitution of the companies and to the arrangements entered into between the companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as circumstances admit.

(4) Where any company alleged to be secondary is not in process of being wound up at the same time as the principal company to which it is alleged to be secondary, the Court shall not direct the secondary company to be wound up unless after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is secondary to the principal company and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or secondary company

(6) Where a company stands in the relation of a principal company to one insurance company and in the relation of a

secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles laid down in this section.

Schemes for partial winding up of insurance companies.

58 (*1*) If at any time it appears expedient that the affairs of an insurance company in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purposes may be prepared and submitted for confirmation of the Court in accordance with the provisions of this Act.

(*2*) Any scheme prepared under this section shall provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise on the proposed winding up), for any future rights of every class of policy-holders in respect of their policies and for the manner of winding up any of the affairs of the company which are proposed to be wound up and may contain provisions for altering the memorandum of the company with respect to its objects and such further provisions as may be expedient for giving effect to the scheme.

(*3*) The provisions of this Act relating to the valuation of liabilities of insurers in liquidation and insolvency and to the application of surplus assets of the life insurance fund in liquidation or insolvency shall apply to the winding up of any part of the affairs of a company in accordance with the scheme under this section in like manner as they apply in the winding up of an insurance company, and any scheme under this section may apply with the necessary modifications any of the provisions of the Indian Companies Act, 7 of 1913, relating to the winding up of companies.

(*4*) An order of the Court confirming a scheme under this section whereby the memorandum of a company is altered with respect to its object shall as respects the alteration have effect as if it were an order confirmed under section 12 of the Indian Companies Act, 7 of 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly.

Return of deposits.

59. In the winding up of an insurance company and in the insolvency of any other insurer the liquidator or assignee as the case may be shall apply to the Court for an order for the return of the deposit made by the company under section 7 and the Court shall on such application order a return of the deposit subject to such terms and conditions as it shall direct.

Notice of policy values.

60. In the winding up of an insurance company for the purposes of a cash distribution of the assets and in the insolvency of any other insurer the liquidator or assignee as the case may be in the case of all persons appearing by the books of the company or other insurer to be entitled to or interested in the policies granted by the company or other insurer shall ascertain the value of the liability of the company or other insurer to each such person and shall give notice of such value to those persons in such manner as the Court may direct and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in such manner and within such time as may be specified by a rule or order of the Court.

Power of Court to reduce contracts of insurance.

61. (*1*) Where an insurance company is in liquidation or any other insurer is insolvent the Court may make an order reducing the amount of the insurance contracts of the company or other insurer upon such terms and subject to such conditions as the Court thinks just.

(*2*) Where a company carrying on the business of life insurance has been proved to be insolvent, the Court may if it thinks fit in place of making a winding up order reduce the amount of the insurance contracts of the company upon such terms and subject to such conditions as the Court thinks fit.

(*3*) Application for an order under this section may be made either by the liquidator or by or on behalf of the company or by a policy-holder, or by the Superintendent of Insurance and the Superinten-

dent of Insurance and any person whom the Court thinks likely to be affected shall be entitled to be heard on any such application.

SPECIAL PROVISIONS RELATING TO EXTERNAL COMPANIES

Power of Central Government to impose reciprocal disabilities on non-Indian companies.

62. Where, by the law or practice of any country outside India in which an insurer carrying on insurance business in British India is constituted, incorporated or domiciled, insurance companies incorporated in British India are required as a condition of carrying on insurance business in that country to comply with any special requirement whether as to the keeping of deposits or assets in that country or otherwise which is not imposed upon insurers of that country under this Act, the Central Government shall, if satisfied of the existence of such special requirement, by notification in the official Gazette, direct that the same requirement, or requirements as similar thereto as may be, shall be imposed upon insurers of that country as a condition of carrying on the business of insurance in British India.

Particulars to be filed by insurers established outside British India.

63. Every insurer, having his principal place of business or domicile outside British India, who establishes a place of business within British India or appoints a representative in British India with the object of obtaining insurance business, shall, within three months from the establishment of such place of business or the appointment of such agent, file with the Superintendent of Insurance :—

(*a*) a certified copy of the charter, statutes, deed of settlement or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not written in the English language a certified translation thereof,

(*b*) a list of the directors, if the insurer is a company,

(*c*) the name and address of some one or more persons resident in British India authorized to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him,

(*d*) the full address of the principal office of the insurer in British India,

(*e*) a statement of the classes of insurance business to be carried on by the insurer, and

(*f*) a statement verified by an affidavit setting forth the special requirements, if any, of the nature specified in section 62 imposed in the country of origin of the insurer on Indian nationals,

and, in the event of any alteration being made in the address of the principal office or in the classes of business to be carried on, or in any instrument here referred to, or in the name of any of the persons here referred to, or in the matters specified in clause (*f*) above, the company shall forthwith furnish to the Superintendent of Insurance particulars of such alteration.

Books to be kept by insurers established outside British India.

64. Every insurer having his principal place of business or domicile outside British India shall keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements and abstracts which he is required under this Act to furnish to the Superintendent of Insurance in respect of the insurance business transacted by him in India to be compiled and, if necessary, checked by the Superintendent of Insurance.

PART III.

PROVIDENT SOCIETIES.

Definition of "provident society".

65. In this Part "provident society" means a person who, or a body of persons whether corporate or incorporate which, receives premiums or contributions for securing annuities on human life or receives premiums or contributions for insuring money to be paid on the happening of any of the following contingencies, namely :—

(*a*) the birth, marriage, death of any person or the survival by a person of a stated age or contingency ;

(*b*) failure of issue ;

(*c*) the occurrence of a social, religious or other ceremonial occasion ;

(*d*) loss of or retirement from employment ;

(*e*) disablement in consequence of sickness or accident ;

(*f*) the necessity of providing for the education of a dependant ; and

(*g*) any other contingency which may be prescribed or which may be authorized by the Provincial Government with the approval of the Central Government.

Application of this Part.

66. Nothing in this Part shall apply to a provident society which pays or undertakes to pay on any policy of insurance an annuity exceeding fifty rupees or a gross sum exceeding five hundred rupees exclusive of any profit or bonus :

Provided that for the purposes of this section contracts entered into before the commencement of this Act shall not be taken into consideration and provided further that " policy " includes a series of policies covering one or more of the contingencies specified in section 65.

Name.

67. No provident society established after the commencement of this Act shall adopt as its name, and no provident society established before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name, any combination of words which fails to include the word " provident " or which includes the word " life ".

Insurable interest.

68. No provident society shall receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium or contribution or the wife, husband, child, grand-child, parent, brother or sister, nephew or niece of such a person.

Dividing business.

69. (*1*) No provident society shall carry on any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution, amongst policies maturing for payment within certain time limits, of certain sums.

(*2*) The Superintendent of Insurance shall, as soon as possible, take steps to have any provident society which carries on business on the dividing principle wound up :

Provided that, where any such provident society in existence at the commencement of this Act applies within three months of such commencement to the Superintendent of Insurance for permission to continue carrying on its business with a view meanwhile to re-organise its business in accordance with the provisions of this Act, the Superintendent of Insurance may at his discretion, with due regard to the past history of the society, permit the society to continue business for a period not exceeding two years from the date of receipt of such permission, so however that no new business on the dividing principle is undertaken by the society.

Registration.

70. (*1*) No provident society except a provident society registered under the provisions of the Provident Insurance Societies Act, 5 of 1912, shall receive any premium or contribution until it has obtained from the Superintendent of Insurance a certificate of registration.

(*2*) Every application for registration shall be accompanied by—

(*a*) a certified copy of the rules of the society, and when the society is a company incorporated under the Indian Companies Act, 7 of 1913, a certified copy of the Memorandum and Articles of Association or where the society is not such a company a certified copy of the deed of constitution of the society ;

(*b*) the names and addresses of the proprietors or directors, and the managers of the society ;

(*c*) a certificate from the Reserve Bank of India that the initial deposit referred in section 73 has been made ; and

(*d*) a declaration verified by an affidavit that the minimum working capital required by section 72 is available.

(*3*) The Superintendent of Insurance may refuse to issue a certificate of registration until he is satisfied that the rules of the society comply with the provisions of this Act and that the minimum working capital required by section 72 is available, but if he is so satisfied he shall register the society and its rules.

(*4*) The Superintendent of Insurance may, after giving previous notice in writing in such manner as he thinks fit specifying the grounds for the proposed cancellation, and allowing the society concerned an opportunity of being heard, apply to the Court and obtain sanction for cancellation of the registration made under this section or made under the provisions of the Provident Insurance Societies Act, 5 of 1912,—

(*a*) if he is satisfied as the result of an inquiry made under section 87—

(*i*) that the society is insolvent or is likely to become so, or

(*ii*) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business,

(*b*) if the initial deposit or any of the further deposits required by section 73 has not been made, or

(*c*) if the society, having failed to comply with any requirement of this Act, has continued such failure for a period of one month after notice of such failure has been conveyed to the society by the Superintendent of Insurance :

Provided that the Superintendent of Insurance may, if he thinks fit, instead of applying for cancellation of the registration under sub-clause (*i*) of clause (*a*) of this sub-section make a recommendation to the Court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate.

Prohibition of managing agents.

71. The provisions of section 32 shall apply to provident societies as they apply to insurers.

Working capital.

72. No provident society established after the commencement of this Act shall be registered unless it has a paid up capital sufficient to provide as working capital a net sum of not less than five thousand rupees exclusive of deposits made under this Act and exclusive in the case of a company of any expenses incurred in connection with the formation of the company.

Deposits.

73. (*1*) Every provident society shall, if established before the commencement of this Act within one year from such commencement, or, if established after the commencement of this Act before the society applies for registration under section 70, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of deposit to five thousand rupees, and shall thereafter make each year a further deposit amounting to not less than one-fifth of the gross premium income for the year (including admission fees and other fees received by the society) until the total amount so deposited and kept is fifty thousand rupees.

(*2*) The provisions of sub-sections (*8*), (*9*) and (*10*) of section 7 and of sub-section (*1*) of section 8 shall apply to the deposits made under this section as they apply to deposits made by an insurer.

Rules.

74. (*1*) Every provident society established after the commencement of this Act shall in its rules set forth—

(*a*) the name, the object and the location of the registered office of the society ;

(*b*) the contingencies or classes of contingency on the happening of which money is to be paid ;

(*c*) the conditions to be complied with before, and the payments to be made on, admission to the society ;

(*d*) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable ;

(*e*) the maximum amount payable to a subscriber or policy-holder ;

(*f*) the nature and amounts of the benefits provided for by the society ;

(*g*) the circumstances in which a bonus may be paid to a policy-holder ;

(*h*) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid ;

(*i*) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on a policy may be returned, or a surrender value of a policy may be granted ;

(*j*) the penalties for delay in paying or failure to pay premiums or contributions ;

(*k*) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society ;

(*l*) the person or persons who or the authority which shall have power to invest the funds of the society ;

(*m*) the provisions for appointment of auditors and their remuneration ;

(*n*) the procedure to be adopted in altering the rules of the society ;

(*o*) unless these are provided for in the articles of association of a society which is

a company incorporated under the Indian Companies Act, 7 of 1913,—

(*i*) the mode of appointment and removal, the qualification and the powers of a director, manager, secretary or other officer of the society ;

(*ii*) the manner of raising additional capital ; and

(*iii*) the provisions for the holding of general meetings of the members and policy-holders and for the powers to be exercised and the procedure to be followed thereat ; and

(*p*) such other matters as may be prescribed.

(*2*) Where the rules of any provident society registered under the Provident Insurance Societies Act, 5 of 1912, fail to comply with the provisions of this section the society shall, before the expiry of twelve months from the commencement of this Act, amend the rules so as to comply with these provisions.

Amendment of rules.

75. (*1*) No amendment of any rule of a provident society shall be valid until it has been sent to the Superintendent of Insurance and has been registered by him.

(*2*) The Superintendent of Insurance on being satisfied that the proposed amendment is not contrary to the provisions of this Act shall, unless he is of opinion that the amendment unfairly affects the rights of existing members or policy-holders of the society, issue to the society an acknowledgment of the registration of the amended rule.

Supply of copy of rules.

76. Every provident society shall on demand deliver free of costs to any member of the society a copy of the rules of the society and to any person other than a member a copy of such rules on the payment of a sum not exceeding one rupee.

Registered office.

77. Every provident society shall have an office (on the outside of which it shall keep displayed its name in a conspicuous position in legible characters) to which all communications and notices may be addressed, and shall give notice to the Superintendent of Insurance of any change in the location thereof within twenty-eight days of its occurrence.

Publication of authorised capital to contain also subscribed and paid up capital.

78. Where any notice, advertisement or other official publication of a provident society contains a statement of the amount of the authorized capital of the society, the publication shall also contain a statement of the capital which has been subscribed and the amount paid up.

Registers and books.

79. Every provident society shall keep at its registered office :—

(*a*) a register of members in which shall be entered the name, address and occupation, if any, of every proprietor, director, manager or secretary and of every member of the society ;

(*b*) a register or record of policies in which shall be entered, in respect of every policy issued by the society, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the society has notice,

(*c*) a register of claims in which shall be entered every claim made, together with the date of the claim, the name and address of the claimant and the date on which the claim is discharged or in the case of a claim which is rejected the date of rejection and the grounds therefor ;

(*d*) a register of agents in which shall be entered the name and address of every agent employed by the society ;

(*e*) a cash book in which shall be entered separately for each class of contingency separately specified in section 65 all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place ;

(*f*) a ledger ; and

(*g*) a journal.

Revenue account, balance-sheet and annual statements.

80. (*1*) Every provident society shall at the expiry of the calendar year prepare a revenue account and balance-sheet in the prescribed form verified in the prescribed manner, together with a report on the general state of the society's affairs and shall cause the revenue account and balance-sheet to be audited by an auditor, and the auditor shall so far as may be in the audit of a provident society have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities imposed on, an auditor of

companies by section 145 of the Indian Companies Act, 7 of 1913.

(2) Every provident society shall at the expiry of the calendar year prepare with respect to that year—

(a) a statement showing separately for each class of contingency separately specified in section 65—

(i) the number of new policies effected, the total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and

(ii) the total amount of claims made and the total amount paid in satisfaction thereof;

(b) a statement showing details of every insurance effected on a life other than the life of the person insuring, and

(c) a statement showing the total amount paid as allowances to agents and canvassers.

(3) Until the expiry of two years from the commencement of this Act this section shall apply to provident societies registered before the commencement of this Act under the Provident Insurance Societies Act, 5 of 1912, as if the reference to the calendar year were a reference to either the financial year or the calendar year.

Actuarial report and abstract.

81. (1) Every provident society shall once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into its financial condition including the valuation of its liabilities and assets by an actuary.

(2) The report of the actuary shall contain an abstract in which shall be stated—

(a) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained,

(b) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation,

(c) the reserve values held against policies effected,

(d) the rate of interest assumed, and

(e) the provision made for expenses,

and shall have appended to it a certificate signed by a principal officer of the society that all material necessary for proper valuation has been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(3) If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policy-holders or as dividend to the shareholders, he shall state in his report whether in his opinion the society is insolvent and, if so, whether it should be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.

Submission of returns to Superintendent of Insurance.

82. (1) The revenue account and balance-sheet with the auditor's report thereon and the report on the general state of the society's affairs referred to in sub-section (1) of section 80, and the statements referred to in sub-section (2) of section 80, shall be furnished as returns to the Superintendent of Insurance within three months from the end of the period to which they relate and copies of the revenue account and balance-sheet and the auditor's report thereon and of the report on the general state of the society's affairs shall, on the application of any member or policy-holder made within two years from the date on which the document was so furnished, be sent to him within fourteen days from the receipt of the application on payment of a fee of one-rupee.

(2) All the material necessary for the proper valuation of the liabilities of the society under the provisions of section 81 shall be placed at the disposal of the actuary within three months from the end of the period to which such material relates, and the report and abstract referred to in section 81 shall be furnished as a return to the Superintendent of Insurance within a further period of three months.

(3) The provisions of section 17 shall apply to the accounts and balance-sheet of a provident society being a company incorporated under the Indian Companies Act, 7 of 1913, as they apply to the accounts and balance-sheet of an insurer.

Actuarial examination of schemes.

83. (1) Every provident society, established after the commencement of this Act, shall cause every scheme of insurance which it proposes to put into operation, and every provident society registered before the

commencement of this Act under the provisions of the Provident Insurance Societies Act, 5 of 1912, shall cause any new scheme which it proposes to put into operation after such commencement to be examined by an actuary, and shall not receive any premium or contribution in connexion with the scheme until the actuary has certified that the scheme is sound and such certificate has been forwarded to the Superintendent of Insurance.

(2) The provisions of sub-section (1) shall apply to any alteration of a scheme already in operation, but the Superintendent of Insurance may, if he is of opinion that the alteration, unfairly affects the interests of existing policy-holders, prohibit the alteration, and, if he does so, the society shall not put the altered scheme into operation, unless it first discharges to the satisfaction of the Superintendent of Insurance all its liabilities to those of the existing policy-holders who dissent from the alteration.

(3) Every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 5 of 1912, shall, as soon as may be and in any event before the expiry of six months from the commencement of this Act, submit all schemes of insurance which the society has in operation at the commencement of this Act to examination by an actuary and shall send the report of the actuary thereon to the Superintendent of Insurance.

(4) The report of the actuary shall state in respect of each scheme whether it is actuarially sound, and; where no actuarial report such as is referred to in section 81 has been made within the two years preceding the examination, the report shall also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and, if not, how in the opinion of the actuary the existing contracts should be modified.

(5) If any scheme is reported by the actuary to be actuarially unsound, the Superintendent of Insurance shall give notice to the society prohibiting the operation of scheme; and the society shall not receive any premium or contribution or effect any policy in connexion with the scheme after the expiry of one month from the receipt of such notice.

(6) Where a scheme is discontinued under the provisions of sub-section (5) the society shall, where its assets are sufficient to meet all existing liabilities, set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so discontinued, and, where its assets are not so sufficient, within three months from the date of the discontinuance, apply to the Court for a modification of its existing contracts or failing such modification for the winding up of the society.

Separation of accounts and funds.

84. Where a provident society effects policies of insurance in connection with more than one of the classes of contingency separately specified in section 65, the receipts and payments in respect of each such class shall be recorded in a separate account in the cash book kept in accordance with section 79.

Investment of funds.

85. (1) Every provident society shall, unless it already holds invested in Government securities or securities mentioned or referred to in clauses (c) and (d) of section 20 of the Indian Trusts Act, 2 of 1882, not less than fifty per cent. of the total assets of the society, invest all surplus assets in such securities until the total amount so invested amounts to not less than fifty per cent. of the total assets of the society, and shall thereafter keep invested in such securities not less than fifty per cent. of the total assets of the society.

(2) No funds or investments of a provident society except a deposit made under section 73 shall be kept otherwise than in the name of the society.

(3) No loan shall be made out of the assets of a provident society to any director or officer of the society except on the security of a policy of insurance held in the society and within its surrender value and no such loan shall be made to any concern of which a director or officer of the society is a director or partner.

(4) Any director or officer of a society which contravenes the provisions of sub-section (3), who is knowingly a party to the contravention, shall without prejudice to any other penalty which he may incur be jointly and severally liable to the society for the amount of the loan, and such amount, together with interest from the date of the loan at such rate not exceeding twelve per cent. per annum as the Superin-

tendent of Insurance may fix, shall on application by the Superintendent of Insurance to any civil Court of competent jurisdiction be recoverable by execution as if a decree for such amount had been passed by that Court.

Inspection of books.

86. The books of every provident society shall at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him in this behalf or by any member or policy-holder of the society who has made an application in this behalf to the Superintendent of Insurance.

Inquiry by or on behalf of Superintendent of Insurance.

87. (*1*) The Superintendent of Insurance shall at least once in two years and may, if he thinks fit, at any time visit personally or depute a suitable person to visit the principal office of a provident society and inquire into the solvency of the society and the manner in which the business of the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an inquiry to be made by an auditor or actuary appointed by him.

(*2*) For the purposes of any such inquiry the Superintendent or the auditor or actuary, as the case may be, shall be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.

(*3*) The results of any such inquiry shall be recorded in a report which shall be kept in the office of the Superintendent and a copy of the report shall be sent to the society concerned and shall be open to inspection by any member or policy-holder of the society.

Winding up by Court and voluntary winding up.

88. (*1*) The Court may order the winding up of a provident society being a company incorporated under the Indian Companies Act, 7 of 1913, and the provisions of that Act shall subject to the provisions of this Part, apply accordingly.

(*2*) In addition to the grounds on which such an order may be based, the Court may order the winding up of a provident society, if the registration of the society is cancelled by the Superintendent of Insurance under sub-section (*4*) of section 70 and he applies for the winding up of the society.

(*3*) A provident society being a company incorporated under the Indian Companies Act, 7 of 1913, may be wound up voluntarily in accordance with the provisions of that Act, but shall not be so wound up except for the purpose of effecting an amalgamation or re-construction of the society or on the ground that by reason of its liabilities it cannot continue its business.

(*4*) A provident society not being a company incorporated under the Indian Companies Act, 7 of 1913, may be wound up voluntarily under this Act if a resolution is passed by the proprietors that the society should be wound up voluntarily for the purpose or on the ground specified in sub-section (*3*), and the Superintendent of Insurance may, in any case where he has ordered the cancellation of the registration of a society under sub-section (*4*) of section 70, order the winding up of the society under this Act.

Reduction of Insurance contracts.

89. The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just—

(*a*) if the Superintendent of Insurance as an alternative to cancelling the registration of a society under sub-section (*4*) of section 70 applies to the Court in this behalf;

(*b*) if while a society is in liquidation the Court thinks fit;

(*c*) if when a society has been proved to be insolvent the Court thinks fit to do so in place of making an order for the winding up of the society; or

(*d*) if the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy holders an opportunity to be heard that it is desirable to do so.

Appointment of liquidator.

90. (*1*) Where a provident society is to be wound up whether under the Indian Companies Act, 7 of 1913, or under this Act, the society shall, within seven days from the date of the order of the Court ordering the winding up or the passing of the resolution authorizing the winding up, as the case may be, give notice

thereof to the Superintendent of Insurance, and, except where the winding up is done by an order of the Court, the Superintendent of Insurance shall appoint the liquidator and shall determine the remuneration to be paid to him.

(2) Any liquidator so appointed may be removed by the Superintendent of Insurance if satisfied that the duties entrusted to him are not being properly discharged.

Powers of liquidator.

91. (1) A liquidator appointed to wind up a society shall have power—

(a) to institute or defend any legal proceedings on behalf of the society by his name of office ;

(b) to determine the contribution to be made by members of the society respectively to the assets of the society ;

(c) to investigate all claims against the society and to decide questions of priority arising between claimants ;

(d) to determine by what persons and in what proportion the costs of the liquidation are to be borne ;

(e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society ;

(f) to summon, and enforce the attendance of, witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a civil Court by the Code of Civil Procedure, 5 of 1908 ; and

(g) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

(2) The liquidator shall, for settling the list of contributories and realizing the amount of contributions, have the same powers as an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 7 of 1913.

Procedure at liquidation.

92. (1) As soon as a liquidator is appointed to wind up a society he shall take charge of all property moveable or immovable of the society and of all its books and documents.

(2) If any proprietor or officer of the society or any other person retains any portion of the assets of the society or fails to deliver to the liquidator any book or document when so required by the liquidator, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and the Court may order the delivery of the assets or book or document to the liquidator.

(3) The liquidator shall within fifteen days of his appointment send notice by post to all persons who appear to him to be creditors of the society that a meeting of the creditors of the society will be held on a date not being less than twenty-one nor more than twenty-eight days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated.

(4) At the meeting so held the creditors shall determine whether an application shall be made for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection, and, if they so resolve and an application accordingly is made at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting, the Superintendent of Insurance shall appoint a suitable person in place of or jointly with the liquidator already appointed, and, if so desired, a committee of inpection.

(5) The committee of inspection shall, subject to any prescribed conditions, have a general power of supervision over the acts of the liquidator and shall have the right to inspect his accounts at all reasonable times.

(6) The liquidator shall, with such assistance from an actuary as may be required, ascertain as soon as practicable the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society, and shall give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice shall be bound by the value so ascertained.

(7) The liquidator shall make a valuation of the assets of the society and an estimate of the costs of the winding up,

and shall on the basis of these settle the list of contributories.

(*8*) The liquidator shall apply to the Superintendent of Insurance for an order for the return of the deposit made by the society under section 73 and the Superintendent of Insurance shall on such application order the return of the deposit subject to such terms and conditions as he may think fit.

(*9*) In administering and distributing the assets of the society the liquidator shall have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.

(*10*) The liquidator shall keep books of account in which he shall record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books may, with the sanction of the Superintendent of Insurance, be inspected by any creditor or contributory.

(*11*) If the winding up continues for more than a year, the liquidator shall summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and shall lay before them an account of his acts and dealings and of the conduct of the winding up, and that account together with any views expressed thereon by the meeting shall be forwarded by the liquidator to the Superintendent of Insurance.

(*12*) So far as is not otherwise provided herein or is not otherwise prescribed under this Act, the liquidator shall so far as practicable follow the procedure to be followed by an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 7 of 1913.

Dissolution of provident society.

93. (*1*) As soon as the affairs of a provident society are fully wound up the liquidator shall prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and shall call a meeting of the members, creditors and contributories for the purpose of laying before it the account and giving any explanation thereof.

(*2*) Notice of the meeting shall be sent to each person individually and shall be advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.

(*3*) Within one week after the meeting the liquidator shall send to the Superintendent of Insurance a copy of the account and shall report to him the holding of the meeting and its date and shall forward to him a copy of the proceedings of the meeting.

(*4*) The Superintendent of Insurance may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator shall comply with such requirement and shall submit a further report to the Superintendent of Insurance within six months.

(*5*) If the Superintendent of Insurance is satisfied that the affairs of the society have been fully wound up he shall register the account of the liquidator who shall forthwith make over to the Superintendent of Insurance sums, if any, remaining undisposed of ; and on the expiry of three months from the registering of the account the Superintendent of Insurance shall declare the society dissolved and cause the dissolution of the society to be notified in the local official Gazette, and the liquidator shall thereupon be discharged from further responsibility.

(*6*) If within a period of five years from the date on which any sums have been made over to the Superintendent of Insurance under sub-section (*5*) an order of a Court of competent jurisdiction has not been obtained at the instance of any claimant to such sums for their disposal, the said sums shall become the property of Government.

Nominations and assignments.

94. (*1*) The provisions of section 38 and section 39 relating to assignment, transfer and nomination in the case of life insurance policies shall, subject to the provisions of this section, apply to policies of insurance issued by any provident society covering any of the contingencies specified in clause (*a*) of section 65.

(*2*) No nomination shall be valid if the person nominated is not the husband, wife, father, mother, child, grand-child, brother, sister, nephew or niece of the holder of the policy.

PART IV.

MUTUAL INSURANCE COMPANIES AND CO-OPERATIVE LIFE INSURANCE SOCIETIES.

Definitions.

95. (*1*) In this Part —

(*a*) "Mutual Insurance Company" means an insurer, being a company incorporated under the provisions of the Indian Companies Act, 7 of 1913, which has no share capital and of which by its constitution only and all policy-holders are members, and

(*b*) "Co-operative Life Insurance Society" means an insurer being a society registered under the Co-operative Societies Act, 2 of 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on whose application the society is registered and all policy-holders are members :

Provided that any Co-operative Life Insurance Society in existence at the commencement of this Act shall be allowed a period of one year to comply with the provisions of this Act.

(*2*) Notwithstanding anything contained in sub-section (*1*), other co-operative societies may be admitted as members of a Co-operative Life Insurance Society, without being eligible to any dividend, profit or bonus.

(*3*) A Provincial Government may, subject to any rules made by the Central Government, empower the Registrar of Co-operative Societies of the province to register co-operative societies for the insurance of cattle or crops or both under the provisions of the Co-operative Societies Act in force in the province.

(*4*) A Provincial Government may make rules not inconsistent with any rules made by the Central Government to govern such societies, and the provisions of this Act, in so far as they are inconsistent with those rules, shall not apply to such societies.

Notes.— In this part special provisions have been made for two special classes of insurers, viz, Mutual Insurance Companies and Co-operative Life Insurance Societies for whom the provisions made in Part II are not wholly suitable.

Application of Act to Mutual Insurance Companies and Co-operative Life Insurance Societies.

96. The provisions of sections 6 and 7 and of sub-section (*2*) of section 20, so far as those provisions are inconsistent with the provisions of this Part, shall not apply, and the provisions of this Part shall apply to Mutual Insurance Companies and Co-operative Life Insurance Societies.

Working capital of Mutual Insurance Companies and Co-operative Life Insurance Societies.

97. No Mutual Insurance Company incorporated after the 26th day of January 1937, and no Co-operative Life Insurance Society registered after that date under the Co-operative Societies Act, 2 of 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies shall be registered under this Act, unless it has as working capital a sum of fifteen thousand rupees, exclusive of the deposit to be made before or at the time of application for registration in accordance with sub-section (*2*) of section 98 of this Act and of the preliminary expenses, if any, incurred in the formation of the company or society.

Deposits to be made by Mutual Insurance Companies and Co-operative Life Insurance Societies.

98. (*1*) Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of two hundred thousand rupees in cash or in approved securities estimated at the market value of the securities on the day of deposit.

(*2*) The deposit referred to in sub-section (*1*) may be made in instalments, of which the first shall be a payment, made before or at the time the application for registration under this Act is made, of twenty-five thousand rupees or such sum as with any deposit previously made by the insurer under the provisions of the Indian Life Assurance Companies Act, 6 of 1912, brings the amount deposited up to twenty-five thousand rupees, and the subsequent instalments shall be annual instalments made before the expiry of each sub-

sequent year of an amount in cash or in approved securities estimated at the market value of the securities on the day of payment of the instalment, equal to one-third of the gross premium income received in the previous year.

Transferees and assignees of policies not to become members.

99. No transferee or assignee of a policy issued by an insurer to whom this Part applies shall become a member of a Mutual Insurance Company or a Co-operative Life Insurance Society merely by reason of any such transfer or assignment.

Publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies.

100. Notwithstanding the provisions of section 79 and section 131 of the Indian Companies Act, 7 of 1913, a Mutual Insurance Company or a Co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance-sheet, revenue account and other documents which they are required to send to the members under those sections, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in an Indian language circulating in the place where the principal office of the company is situated:

Provided that, where any members of the company are domiciled in a province other than that in which the principal office of the company is situated, publication of the balance-sheet, revenue account and notice of the meetings shall be made in a newspaper or newspapers published in the principal languages of that province and circulating therein.

Supply of documents to members.

101. Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, on the application of any member made within two years from the date on which any such document is furnished to the Registrar of Companies under the provisions of section 134 of the Indian Companies Act, 7 of 1913, or to the Registrar of Co-operative Societies of the province in which the Co-operative Life Insurance Society is registered, furnish a copy of the document free of cost to the member within fourteen days of the application.

PART V.

MISCELLANEOUS.

Penalty for default in complying with, or act in contravention of, this Act.

102. (*1*) Except as otherwise provided in this Act, any insurer who makes default in complying with or acts in contravention of any requirement of this Act and, where the insurer is a company, any director, managing agent, manager or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing default, with an additional fine which may extend to five hundred rupees for every day during which the default continues.

(*2*) Any provident society which makes default in complying with any of the requirements of Part III and any director, managing agent, manager, secretary or other officer of the society who is knowingly a party to the default, shall be punishable with fine which may extend to five hundred rupees or in the case of a continuing default with fine which may extend to two hundred and fifty rupees for every day during which the default continues.

Penalty for transacting insurance business in contravention of sections 3, 6, 7, 97 and 98.

103. (*1*) Any insurer or any person acting on behalf of an insurer, who transacts any class of insurance business in contravention of any of the provisions of section 3, section 6, section 7, section 97 or section 98, or does any one or more of the acts constituting the business of insurance in relation to any such class of insurance business shall be punishable with fine which may extend to two thousand rupees.

(*2*) Any person knowingly taking out a policy of insurance with any insurer or person guilty of an offence under sub-section (*1*) shall be punishable with fine which may extend to five hundred rupees:

Provided that nothing in this section shall apply to the business of re-insurance between the head office of an insurer in British India and the head office of an insurer not having an office in British India.

Penalty for false statement in document.

104. Whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of

this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both.

Wrongfully obtaining or withholding property.

105. Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied and in default to suffer imprisonment for a period not exceeding two years.

Wrongfully diminishing life insurance fund.

106. If on the application of an insurer or any member of an insurance company or any policy-holder or the liquidator of an insurance company (in the event of the insurer being in liquidation) the Court is satisfied that by reason of any contravention of the provisions of this Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the insurer shall be deemed in respect of the contravention to have been guilty of misfeasance in relation to the insurer unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omission on his part; and the Court shall have all the powers which a Court has under sections 235 and 237 of the Indian Companies Act, 7 of 1913, and shall also have the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.

Previous sanction of Advocate-General for institution of proceedings.

107. Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-section (*2*) of section 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate-General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

Power of Court to grant relief.

108. If in any proceedings, civil or criminal, it appears to the Court hearing the case that a person is or may be liable in respect of negligence, default, breach of duty or breach of trust but that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him either wholly or partly from his liability on such terms as it may think fit.

Cognizance of offences.

109. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Appeals.

110. (*1*) An appeal shall lie to the Court having jurisdiction from any of the following orders, namely:—

(*a*) an order under section 3 refusing to register, or cancelling the registration of, an insurer;

(*b*) an order under section 5 directing the insurer to change his name;

(*c*) an order under section 42 cancelling the licence issued to an agent;

(*d*) an order under section 75 refusing to register an amendment of rules;

(*e*) an order under section 87 directing an inquiry by an auditor or actuary; or

(*f*) an order made in the course of the winding up or insolvency of an insurer or a provident society.

(*2*) The Court having jurisdiction for the purposes of sub-section (*1*) shall be the principal Court of civil jurisdiction within whose local limits the principal place of business of the insurer concerned is situate.

(*3*) An appeal shall lie from any order made under sub-section (*1*) to the authority

authorised to hear appeals from the decisions of the Court making the same and the decision on such appeal shall be final.

Service of notices.

111. (*1*) Any process or notice required to be served on an insurer or provident society shall be sufficiently served if addressed to any person registered with the Superintendent of Insurance as a person authorised to accept notices on behalf of the insurer or provident society and left at, or sent by registered post to, the address of such person as registered with the Superintendent of Insurance.

(*2*) Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent and any notice so addressed and sent shall be deemed to be notice to the holder of such policy :

Provided that, where any person claiming to be interested in a policy as transferee, assignee or nominee has given to an insurer or to a provident society notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice.

Declaration of interim bonuses.

112. Notwithstanding anything to the contrary contained in this Act an insurer carrying on the business of life insurance shall be at liberty to declare an *interim* bonus or bonuses to policy-holders whose policies mature for payment by reason of death or otherwise during the inter-valuation period on the recommendation of the investigating actuary made at the last preceding valuation.

Acquisition of surrender values by policy.

113. (*1*) Where a definite number of premiums is payable a policy of life insurance on which all premiums have been paid for three consecutive years shall acquire a guaranteed surrender value and notwithstanding any contract to the contrary shall not lapse by reason of non-payment of further premium but shall notwithstanding such non-payment be kept alive to the extent of its paid up value.

Explanation.—For the purposes of this sub-section the paid up value of a policy shall be an amount bearing to the total sum assured by the policy the same proportion as the total of the premiums already paid on the policy bears to the total of the premiums payable under the policy.

(*2*) A policy kept alive to the extent of its paid up value under sub-section (*1*) shall not participate in any profits of the insurer earned after the conversion of the policy into a paid up policy.

(*3*) This section shall not apply to—

(*a*) policies in respect of which the sum assured is payable only on the happening of a contingency which may not arise, or

(*b*) where the paid up value will be less than one hundred rupees, or

(*c*) where the parties after the default has occurred in the payment of the premium agree in writing to some other arrangement, or

(*d*) to policies in which the surrender value is automatically applied under the terms of the contract to maintaining the policy in force after its lapse through non-payment of premium.

Power of Central Government to make rules.

114. (*1*) The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules to carry out the purposes of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the qualifications to be possessed by actuaries ;

(*b*) the manner in which it shall be determined for the purposes of this Act what is insurance business transacted in British India ;

(*c*) the procedure to be followed by the Reserve Bank of India in dealing with deposits made in pursuance of this Act, including the receipt of, custody of, withdrawal of, and payment of interest on securities lodged as such deposits, and their inspection and verification by the Superintendent of Insurance ;

(*d*) the form referred to in clause (*d*) of sub-section (*2*) of section 16 ;

(*e*) the manner in which the prospectuses and tables referred to in sub-section (*1*) of section 41 shall be published and the form in which they shall be drawn up ;

(*f*) the matters to be prescribed for the purposes of section 48 :

(*g*) the manner in which licences to act as insurance agents may be issued or cancelled ;

(*h*) the contingencies other than those specified in clauses (*a*) to (*f*) of section 65

on the happening of which money may be paid by provident societies ;

(*i*) the matters other than those specified in clauses (*a*) to (*o*) of sub-section (*1*) of section 74 on which a provident society shall make rules ;

(*j*) the form of any account, return or register required by Part III and the manner in which such account, return or register shall be verified ;

(*k*) subject to the provisions of this Act, the fees payable thereunder and the manner in which they are to be collected ; and

(*l*) the conditions and the matters which may be prescribed under sub-sections (*5*), (*10*) and (*12*) of section 92 :

Provided that every rule made under this section shall be laid as soon as may be after it is made before both Chambers of the Central Legislature for one month while they are in session ; and, if within one month from the later date on which the rule has so been laid both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or shall be of no effect, as the case may be.

(*3*) All rules made by a Local Government under the provisions of section 24 of the Provident Insurance Societies Act, 5 of 1912, and in force at the commencement of this Act shall so far as not inconsistent with the provisions of Part III continue in force and have effect as if duly made under this section until they are replaced by rules made under this section.

Alteration of forms.

115. The Central Government may, on the application or with the consent of an insurer, not being a company, alter the forms contained in the Schedules as respects that insurer, for the purpose of adapting them to the circumstances of that insurer :

Provided that nothing done under this section shall exempt the insurer from supplying all information required under this Act so far as it is possible for the insurer to do so.

Power to exempt from certain requirements.

116. The Central Government may, by notification in the official Gazette, exempt any insurer constituted, incorporated or domiciled in an Indian State from the provisions of section 6 relating to deposits or from the provisions of sub-section (2) of section 27 relating to the keeping of assets in India either absolutely or subject to such conditions or modifications as may be specified in the notification.

Saving of provisions of Indian Companies Act, 1913.

117. Nothing in this Act shall affect the liability of an insurer being a company to comply with the provisions of the Indian Companies Act, 7 of 1913, in matters not otherwise specifically provided for by this Act.

Exemptions.

118. Nothing in this Act shall apply to any Trade Union registered under the Indian Trade Unions Act, 16 of 1926, or to any insurance business carried on by the Central or by a Provincial Government, or to any provident fund to which the provisions of the Provident Funds Act, 19 of 1925, apply, or, if the Superintendent of Insurance so orders in any case, and to such extent as he specifies in such order, to—

(*a*) any fund in existence and officially recognized by the Central Government before the 27th day of January 1937, maintained by or on behalf of Government servants or Government pensioners for the mutual benefit of contributors to the fund and of their dependents, or

(*b*) any mutual or provident insurance society composed wholly of Government servants or of railway servants which has been exempted from any or all of the provisions of the Provident Insurance Societies Act, 5 of 1912.

Policy forms to be deposited with the Superintendent of Insurance.

119. Every insurer registered under this Act shall deposit and keep deposited with the Superintendent of Insurance copies of all standard forms of policy contracts issued by him in India.

Determination of market value of securities deposited under this Act.

120. The market value on the day of deposit of securities deposited in pursuance of any of the provisions of this Act with the Reserve Bank of India shall be determined by the Reserve Bank of India whose decision shall be final.

121. To the *Exception* to section 130 of the Transfer of Property Act, 4 of 1882, the following words and figures shall be added, namely ;

Amendment of section 130, Act 4 of 1882.

"or affects the provisions of section 38 of the Insurance Act, 1938".

122. In the First Schedule to the Indian Limitation Act, 9 of 1908, for the entry in the third column relating to article 85 the following entry shall be substituted, namely :

Amendment of schedule 1, Act 9 of 1908.

"The date of the death of the deceased . . . . ."

123. The Provident Insurance Societies Act, 5 of 1912, the Indian Life Assurance Companies Act, 6 of 1912, and the Indian Insurance Companies Act, 20 of 1928, are hereby repealed.

Repeals.

THE FIRST SCHEDULE.

(*See* Section 11.)

REGULATIONS AND FORMS FOR THE PREPARATION OF BALANCE SHEET.

PART I.

Regulations.

1. The balance-sheet required to be prepared in respect of every class of business carried on by an insurer is, in the form in which it is set out in Part II of this Schedule (Form A), appropriate to a case where the insurer maintains a separate fund in respect of life insurance business.

2. The balance-sheet of life insurance business shall be prepared as a separate document. The balance-sheet of any class of business may be prepared as a separate document instead of being incorporated by the addition of columns and headings in the general balance-sheet, but the totals of each such separate balance-sheet (showing the total assets of the class of business, the balance at the credit of the life insurance fund or other separate fund or account, the amount of share-holders' undivided profits, and outstanding liabilities) must in any case be incorporated in the general balance-sheet.

3. If any combined balance-sheet is for any purpose issued by an insurer, it shall be in accordance with the Form set out in this Schedule, and there shall not be included among the assets shown in any such combined balance-sheet any amount in respect of any holding in or advance to any insurer whose assets and liabilities have been incorporated therein. Every combined balance sheet must show clearly on the face thereof that it is a combined balance-sheet and must set out fully the name of every insurer whose assets and liabilities have been incorporated therein ; if the assets and liabilities of any person not being an insurer are included in a combined balance-sheet the fact must be stated thereon.

4. Where any guarantee has been given by an insurer (otherwise than in the ordinary course of re-insurance business) in respect of the policies of any other insurer the balance-sheet of the insurer by whom the guarantee was given must show clearly the name of every insurer whose policies have been so guaranteed and the extent of the guarantee :

Provided that this regulation shall not apply where a combined balance-sheet is issued incorporating the assets and liabilities of the insurer whose policies are guaranteed.

5. Where any part of the assets of an insurer is deposited in any place outside British India as security for the owners of policies issued in that place, the balance-sheet shall state that part of the assets has been so deposited, and if any such part forms part of the life insurance fund, shall show the amount thereof and the place where it is deposited. Where any combined balance-sheet is issued by an insurer for any purpose, the information required by this regulation shall be shown in the aggregate in respect of all the insurers whose assets and liabilities have been incorporated in the balance-sheet.

6. There shall be appended to the balance-sheet a statement in Form AA as set out in Part II of this Schedule showing the market value and the book value of the assets in India.

7. Every balance-sheet shall contain the following certificates, namely :—

(*a*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet explaining how the values as shown in balance-sheet of the Investments in Stocks and Shares have been arrived at, and how the market value thereof has been ascertained for the purpose of comparison with the values so shown ;

(*b*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and signed also, so far

as respects the value of any items shown in the balance-sheet under the heading of "Reversions and Life Interests", by an actuary, certifying that the values of all the assets have been reviewed as at the date of the balance-sheet, and that in their belief the assets set forth in the balance-sheet are shown in the aggregate at amounts not exceeding their realisable or market value under the several headings — "Loans", "Reversions and Life Interests", "Investments", "Agent's Balances", "Outstanding Premiums", "Interest, Dividends and Rents outstanding", "Interest, Dividends and Rents accruing but not due", "Amounts due from other Persons or Bodies carrying on Insurance Business", "Sundry Debtors", "Bills Receivable", "Cash" and the several items specified under "Other Accounts":

Provided that if the persons signing the certificate are unable to certify that the assets set forth in the balance-sheet are so shown as aforesaid, a full explanation of the bases upon which the values shown in the balance-sheet have been assessed shall be given in the certificate;

(*c*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and by the auditor certifying that no parts of the assets of the life insurance fund has been directly or indirectly applied in contravention of the provisions of this Act relating to the application and investment of life insurance funds; and

(*d*) certificates signed by the auditor (which shall be in addition to any other certificate or report which he is required by law to give with respect to the balance-sheet) certifying—

(*i*) that he has verified the cash balances and the securities relating to the insurer's loans, reversions and life interests, and investments;

(*ii*) to what extent, if any, he has verified the investments and transactions relating to any trusts undertaken by the insurer as trustee; and

(*iii*) in the case of a combined balance-sheet, that he has audited the balance-sheet and accounts of every insurer whose assets and liabilities are incorporated therein, or that any such balance-sheet and accounts which have not been audited by him have been certified by independent auditors. The said certificate shall contain a reference to such reservations, if any, as may have been made by any auditor upon any report or certificate given by him with respect to the balance-sheet and accounts of any insurer whose assets and liabilities are incorporated in the combined balance-sheet.

8. If the values shown in the balance-sheet in respect of "Holdings in Subsidiary Companies" or "House property (*i*) in India (*ii*) out of India" have been increased since the last previous balance-sheet, the certificate required by paragraph (*b*) of the last foregoing regulation shall state the amount of every increase not solely due to the cost of subsequent additions or, as respects holdings in controlled companies, to increased profits, and shall contain an explanation of the reason therefor.

9. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "combined balance-sheet" includes any combined statement made by an insurer of assets and liabilities in the form of a balance-sheet which includes the assets and liabilities of any other insurer; and

(*b*) "market value" means as respects any asset the market value thereof as ascertained from published market quotations, or, if there be no such value, its fair value as between a willing buyer and a willing seller.

PART II.

FORMS.

FORM A.

Form of Balance-Sheet.

Balance-Sheet of 19 .

—	Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.	—	Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.
	Rs. A. P.	Rs. A. P.	Rs. A. P.	Loans :	Rs. A. P.	Rs. A. P.	Rs. A. P.
Shareholders' Capital (each class to be stated separately)				On Mortgages of property within British India			
Authorized :				On Mortgages of property outside British India			
.....Shares of Rs.....each Rs.				On Security of municipal and other public rates			
Subscribed :				On Stocks and Shares			
.....Shares of Rs.....each Rs.				On Insurer's policies within their surrender value			
Called up :				On Personal security			
.....Shares of Rs.....each Rs.				To Subsidiary Companies (other than Reversionary) (*f*)			
Less Unpaid calls. Rs.				Reversions and Life Interests :			
Reserve or Contingency Accounts (*a*) :				Reversions and Life Interests purchased			
Investment Reserve Account				Loans on Reversions and Life Interests ..			
Profit and Loss Appropriation Account Balance.				Debentures and Debenture Stocks of Subsidiary Reversionary Companies (*f*) ..			
Balances of Funds and Accounts :				Ordinary Stocks and Shares of Subsidiary Reversionary Companies (*f*) ..			
Life Insurance Fund				Loans to Subsidiary Reversionary Companies (*f*)			
Fire Insurance Business Account ..				Investments :			
Marine Insurance Business Account ..				Deposit with the Reserve Bank of India (Securities to be specified)			
Accident and Miscellaneous Insurance Business Account				Indian Government Securities ..			
Other accounts, if any (to be specified) (*l*)				Provincial Government Securities ..			
Pension or Superannuation Accounts (*b*)							

Debenture Stock per cent.			British, British Colonial and British Dominion Government Securities ..		
Loans and Advances (*c*)			Foreign Government Securities ..		
Bills Payable (*c*)			Indian Municipal Securities		
Estimated Liability in respect of outstanding claims, whether due or intimated (*d*)			British and Colonial Securities ..		
			Foreign Securities		
Annuities due and unpaid (*d*)			Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the Indian Government or a Provincial Government		
Outstanding Dividends					
Amounts due to Other Persons or Bodies carrying on Insurance Business (*c*) ..			Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the British or any Colonial Government		
Sundry Creditors (including outstanding and accruing expenses and taxes) (*c*) ..					
Other sums owing by the insurer (particulars to be given) (*c*)			Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government ..		
Contingent Liabilities (to be specified) (*e*) ..			Debentures of any railway in India ..		
			Debentures of any railway out of India ..		
Rs. ———			Preference or guaranteed Shares of any railway in India		
			Preference or guaranteed Shares of any railway out of India		
			Railway Ordinary Stocks (*i*) in India (*ii*) out of India		
			Other Debentures and Debenture Stock of Companies incorporated (*i*) in India (*ii*) out of India		
			Other guaranteed and Preference Stocks and Shares of Companies incorporated (*i*) in India (*ii*) out of India		
			Other Ordinary Stocks and Shares of Companies incorporated (*i*) in India (*ii*) out of India		
			Holdings in Subsidiary Companies (*f*) ..		
			House property (*i*) in India (*ii*) out of India		
			Freehold and Leasehold ground rents and rent charges		
			Agent's Balances		
			Outstanding Premiums (*g*)		
			Interest, Dividends and Rents outstanding (*d*)		
			Carried over ..		

FORM A—*contd.*

—	Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.	—	Life and Annuity Business. (1)	Other Classes of Business. (2)*	Total.
	Rs. A. P.	Rs. A. P.	Rs. A. P.	Brought forward ..	Rs. A. P.	Rs. A. P.	Rs. A. P.
				Interest, Dividends and Rents accruing but not due (*d*)			
				Amounts due from Other Persons or Bodies carrying on Insurance Business (*h*) ..			
				Sundry Debtors (*i*)			
				Bills Receivable			
				Cash :			
				At Bankers on Deposit Account ..			
				At Bankers on Current Account and in hand			
				At Call and Short Notice (*j*)			
				Other Accounts (to be specified) (*k*) ..			

* Assets and liabilities, Shareholders' Capital and Reserves, not allocated to any class of business specified in column (1) must be shown in column (2).

Notes.

(*a*) The Reserves or Contingency Accounts must be separately stated.

(*b*) If the insurer has not full and unrestricted control of the assets constituting the Pension or Superannuation Accounts, either those Accounts and the assets and liabilities relating thereto must be omitted from the balance sheet or the assets of which the insurer has not such control must be clearly indicated on the face of the balance-sheet.

(*c*) If the insurer has deposited security as cover in respect of any of these items, the amount and nature of the securities so deposited must be clearly indicated on the face of the balance sheet.

(*d*) These items are or have been included in the corresponding items in the Revenue or Profit and Loss Account. Outstanding and accruing interest, dividends and rents must be shown after deduction of income-tax or the income-tax must be provided for amongst the liabilities on the other side of the balance-sheet.

(*e*) Such items as amount of liability in respect of bills discounted, uncalled capital of subsidiary companies, uncalled capital of other investments, etc., must either be shown in their several categories under the heading "Contingent Liabilities" or the appropriate items on the assets side must be set out in such detail as will clearly indicate the amount of the uncalled capital.

(*f*) As respects life and annuity business full particulars of holdings in and loans to subsidiary companies must be stated, giving the name of each company, the number and description of each class of shares held, the amounts paid up thereon, and the value at which the holdings in each company stand in the balance-sheet.

(*g*) Either this item must be shown net or the commission must be provided for amongst the liabilities on the other side of the balance-sheet.

(*h*) The aggregate amount owing by a subsidiary company or subsidiary companies is to be shown separately from all other assets and the aggregate amount owing to a subsidiary company or subsidiary companies is to be shown separately from all other liabilities.

(*i*) Amounts due from directors and officers must be shown separately.

(*j*) No amounts must be entered under this heading unless fully secured. If not fully secured, the amounts must be included under the heading "Sundry Debtors."

(*k*) Under this heading must be included such items as the following, which must be shown under separate headings suitably described : office furniture, goodwill, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued, other expenditure carried forward to be written off in future years, balance being loss on Profit and Loss Appropriation Accounts, etc. The amounts included in the balance-sheet must not be in excess of cost.

(*l*) Under the head "Other accounts, if any (to be specified)" on the left hand side, fines realized from the staff and their contribution towards the provident fund, if any, should be shown under separate sub-heads.

FORM AA.

Classified Summary of the Indian Assets of the..... Company on 19 .

Class of Asset.	Book value as per (a) below.	Market value as per (b) below.	Remarks as per (c) below.
	Rs.	Rs.	
(1) Government of India Securities ...			
(2) Indian Provincial Government Securities.			
(3) Indian Municipal Port and Improvement Trust Securities including Debentures.			
(4) Debentures of Indian Railways ...			
(5) Guaranteed and Preference Shares of Indian Railways.			
(6) Annuities of Indian Railways ...			
(7) Ordinary Shares of Railways in India			
(8) Other Debentures of concerns in India			
(9) Other Guaranteed and Preference Shares of concerns in India.			
(10) Other Ordinary Shares of concerns in India.			
(11) Loans on the Company's policies effected in India and within their surrender value.			
(12) Loans on Mortgage of property in India.			
(13) Loans on Personal Security to persons domiciled and resident in India.			
(14) Other loans granted in India (particulars to be stated).			
(15) Land and House Property in India ...			
(16) Cash on Deposit in banks in India ...			
(17) Cash in Hand and on current account in banks in India.			
(18) Agents' balances and outstanding premiums.			
(19) Interest, dividends and rents either outstanding or accrued but not due.			
(20) Other assets in India (to be specified) ...			

The statement shall show—

(*a*) the value for which credit is taken in the balance-sheet for each of the abovementioned classes of assets,

(*b*) the market value of such of the abovementioned classes of assets as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance-sheet.

(*c*) how the value of such of the abovementioned classes of assets as has not been ascertained from published quotations has been arrived at, and

(*d*) the rates of exchange at which the values of the assets other than in rupee currency have been converted into rupees.

The market values need not be shown separately where they are not less than the book values and a certificate to that effect is appended to the statement.

No amounts on account of any of the following items may be entered in the statement :—

Goodwill.

Preliminary, formation, organisation or development expenses.

Commission or discount on shares or debentures issued.

Commuted Commission.

Expenditure carried forward to be written off in future years.

THE SECOND SCHEDULE.

(*See* section 11.)

Regulations and Forms for the preparation of Profit and Loss Accounts.

PART I.

Regulations.

1. The items on the income side of the Profit and Loss Account and Profit and Loss Appropriation Account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

2. Deductions from Interest, Dividends and Rents to be shown in respect of income-tax must include all amounts in respect of British Indian income-tax whether or not it has been or is to be deducted at source or paid direct.

3. The Interest, Dividends and Rents, *less* income-tax thereon shown in the Revenue Accounts for any classes of business other than life insurance business, including annuity business may, if the insurer so desires, be included with the corresponding items in the Profit and Loss Account.

PART II.

FORMS.

FORM B.

Form of Profit and Loss Account.

Profit and Loss Account of for the year ended 19 .

	Rs. A. P.		Rs. A. P.
British Indian Taxes on the Insurer's Profits (not applicable to any particular Fund or account).		Interest, Dividends and Rents (not applicable to any particular Fund or Account). Rs.	
		Less—Income-tax thereon. Rs.	
Expenses of Management (not applicable to any particular Fund or Account)*.		Profit on realisation of Investments (not credited to Reserves or any particular Fund or Account) . . .	
Loss on Realisation of Investments (not charged to Reserves or any particular Fund or Account) . .		Appreciation of Investments (not credited to Reserves or any particular Fund or Account) .	
Depreciation of Investments (not charged to Reserves or any particular Fund or Account) . . .		Profit transferred from Revenue Accounts (details to be given) .	
Loss transferred from Revenue Accounts (details to be given) . .		Transfer Fees . . .	
Other Expenditure (to be specified) .		Other Income (to be specified) .	
Balance for the year carried to Appropriation Account . .		Balance being loss for the year carried to Appropriation Account . . .	

* If any sum has been deducted from this item and entered on the assets side of the balance sheet, the amount must be shown separately.

FORM C.

Form of Profit and Loss Appropriation Account.

Profit and Loss Appropriation Account of for the year ended 19 .

	Rs. A. P.		Rs. A. P.
Balance being loss brought forward from last year . . .		Balance brought forward from last year. Rs.	
Balance being loss for the year brought from Profit and Loss Account (as in Form B)		*Less*—Dividends since paid in respect of last year (to be specified and if "free of tax" to be so stated)*. Rs.	
Dividends paid during the year on account of the current year (to be specified and if "free of tax" to be so stated) . . .			
Transfers to any particular Funds or Accounts (details to be given) .		Balance for the year brought from Profit and Loss Account (as in Form B) . .	
Balance at end of the year as shown in the Balance-Sheet . .		Balance being loss at end of the year as shown in the Balance-Sheet . . .	

* *Note.*—This item may be shown on the other side of the account if preferred.

THE THIRD SCHEDULE

(*See* section 11.)

Regulations and Forms for the preparation of Revenue Accounts.

PART I.

Regulations.

1. Form D is, as set out in Part II of this Schedule, appropriate for life insurance business, but a separate revenue account must be prepared for every class of business in respect of which the insurer is required to maintain a separate account.

2. Form F is, as set out in Part II of this Schedule, appropriate for fire insurance business. A separate revenue account in the same form must be prepared for accident and miscellaneous insurance including workmen's compensation and motor car insurance. Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business.

3. If any combined revenue account is for any purpose issued by an insurer it must be in accordance with the forms specified in this Schedule and must clearly show on the face thereof that it is a combined revenue account, and must set out fully the name of every insurer required to make separate returns under this Act whose revenue and expenditure have been included therein; if the revenue and expenditure of any person not being an insurer are included in a combined revenue account, the fact must be stated thereon.

4. The items on the income side of the revenue account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

5. Re-insurance premiums, whether on business ceded or accepted, are to be brought into account gross (*i. e.*, before deducting commissions) under the head of premiums.

6. As respects life insurance business the following statements shall be furnished to the Superintendent of Insurance every year showing details provided for in a Form pertaining thereto :—

(A) A statement in form DD as set forth in Part II of this Schedule.

(B) A statement in form DDD as set forth in Part II of this Schedule.

(C) A statement in form DDDD as set forth in Part II of this Schedule.

7. The following information shall be supplied in addition to the revenue account, namely, the gross premium written in India for life, fire, marine and accident and miscellaneous insurance business.

8. Any office premises which form part of the assets of a life insurance fund must be treated as an interest earning investment, and accordingly, in the revenue account for life insurance business a fair rent for the premises must be included under the heading "Interest, Dividends and Rents" and in the revenue account for every class of business for which the premises are used proper charges for the use thereof must be included under the heading "Expenses of Management".

9. Where an insurer carries on the business of life insurance in conjunction with any other class of insurance business the expenses of management charged to the life insurance revenue account must not include more than a resonable proportion of the common expenses and in particular no such account must be charged with more than a fair sum for the use of any office premises having regard to the income from the various classes of business carried on and to the extent to which the premises are used for the purposes of each class of business.

10. Deductions from Interest, Dividends and Rents in respect of income-tax must include all income-tax charged on such income whether or not it has been or is to be deducted at source or paid direct; the income-tax to be shown as so deducted in the life insurance Revenue Account is British Indian, United Kingdom, Foreign and Dominion income-tax, but the income-tax to be shown as deducted in Revenue Accounts of any other classes of business is British Indian income-tax only.

PART II.

FORMS

FORM D

Form of Revenue Account applicable to Life Insurance Business.

Revenue Account of for the year ended 19 ,
in respect of Business.

—	Business within India.	Business out of India. (a)	Total	—	Business within India.	Business out of India. (a)	Total
	Rs.	Rs.	Rs.		Rs.	Rs.	Rs.
Claims under Policies (including provision for claims due or intimated), less Re-insurances ..				Balance of Fund at the beginning of the year			
By death ..							
By maturity ..				Premiums, less Re-insurances—			
Annuities, less Re-insurances ..							
Surrenders (including Surrenders of Bonus), less Re-insurances ..				(*i*) First year premiums			
				(*ii*) Renewal premiums			
Bonuses in cash, less Re-insurances ..				(*iii*) Single premiums			
Bonuses in Reduction of Premiums, less Re-insurances ..				Consideration for Annuities granted, less Re-insurances (*c*) ..			
Commission (less that on Re-insurances) ..							
Expenses of Management (*b*)—				Interest, Dividends and Rents	Rs.		
1. Commission and allowances ..				Less — Income-tax thereon (*d*) ..	Rs.		
2. Salaries, etc. (other than to agents and those contained in item No. 1) ..							
3. Travelling expenses ..				Registration Fees ..			
4. Directors' fees ..				Other Income (to be specified) (*e*) ..			
5. Auditors' fees ..							
6. Law charges ..				Loss transferred to Profit and Loss Account ..			
7. Advertisements ..							
8. Printing and Stationery ..				Transferred from Appropriation Account.			
9. Other expenses of management (accounts to be specified) ..							
10. Other payments (accounts to be specified) ..							
11. Rents for offices belonging to and occupied by the insurer ..							
12. Rents of other offices occupied by the insurer ..							
Bad Debts ..							
United Kingdom, British Indian, Dominion and Foreign Taxes ..							

FORM D — *(Concld.)*

Other Expenditure (to be specified) ..	
Profit transferred to Profit and Loss Account ..	
Balance of Fund at the end of the year as shown in the Balance-Sheet ..	

Notes.

(*a*) In the case of an insurer having his head office in British India, these columns apply only to business the premiums in respect of which are payable outside India.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount to be deducted must be shown separately. Under this item the salary paid to the managing agent or managing director shall be shown separately from the total amount paid as salaries to the remaining staff.

(*c*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*d*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*e*) Under the head "Other Income" fines, if any, realised from the staff must be shown separately. All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

(*f*) In the case of an insurer having his principal place of business outside British India, the expenses of management for business out of India and total business need not be split up to the several sub-heads, if they are not so split up in his own country.

FORM DD.

Classified statement of life insurance policies of the Company, for the year ending 19 .

	New life insurance business in respect of which a premium has been paid in the year.				Total life insurance business in force at end of the year.		
	Number of policies.	Sums insured and annuities per annum.	Single premiums (including consideration for immediate annuities and all other premiums paid at the outset where no subsequent premium is payable).	Yearly renewal premium income.	Number of policies.	Sums insured with bonuses and annuities per annum.	Premium income for which credit has been taken in the revenue account.
Ordinary policies.		Rs.	Rs.	Rs.		Rs.	Rs.
In India							
Out of India							
Total ...							
Annuity contracts, etc.							
In India							
Out of India							
Total ...							
Group insurance policies.							
In India							
Out of India							
Total ...							

The amounts should be stated to the nearest rupees and after deduction of re-insurances.

FORM DDD.

Additions to and deductions from policies of the Company for the year ending 19 .

	Ordinary life insurance policies insuring money to be paid on death or survivance.			Annuities.	
	No.	Sum assured.	Reversionary bonus additions.	No.	Annuity per annum.
		Rs.	Rs.		Rs.
(1) Policies at beginning of year ...					
(2) New policies issued					
(3) Old policies revived					
(4) Old policies changed and increased ...					
(5) Bonus additions allotted					
Total ...					
Discontinued during year.					
(6) By death					
(7) By survivance or the happening of the contingencies insured against other than death					
(8) By expiry of term under temporary insurances					
(9) By surrender of policy					
(10) By surrender of bonus					
(11) By forfeiture or lapse					
(12) By change and decrease					
(13) By being not taken up					
Total discontinued ...					
Total existing at end of year ...					

FORM DDDD.

Particulars of the policies forfeited or lapsed in the last financial year under review, less those revised and reinstated for full benefits, classified according to the year in which they were issued.

Financial year in which the policies were issued.	Number of policies forfeited or lapsed.	Sum insured under policies forfeited or lapsed.
		Rs.
Year ending 19 , being the year under review		
Year ending 19 , being the year previous to that under review ..		

And so on, the number of and sum insured under policies forfeited or lapsed in the last financial year under review being stated after classification according to each of the preceding years in which they were issued.

A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted.

Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.

FORM E.

Form of Revenue Account applicable to Marine Insurance Business.

Revenue Account of for the year ended 19 ,
in respect of Marine Insurance Business.

	Current year.	Last preceding year.	Previous years.	Total.		Current year.	Last preceding year.	Previous years.	Total.
	Rs.	Rs.	Rs.	Rs.		Rs.	Rs.	Rs.	Rs.
*Claims paid (less Salvages and Re-insurances) (*a*) (*c*) ..					Balance of Marine Insurance Business Account at beginning of the year				
*Commission					Balances				
*Expenses of Management (*b*)					Additional Reserve (if any)				
*Bad Debts					*Premiums (less Returns, Re-insurances, Brokerages and Discount) (*c*)				
United Kingdom, British Indian, Dominion and Foreign Taxes					Interest, Dividends and Rents Rs. Less — Income-tax thereon. . Rs.				
*Other Expenditure (to be specified)					*Other Income (to be specified) (*d*) ..				
Profit transferred to Profit and Loss Account					Loss transferred to Profit and Loss Account.				
Balance of Marine Insurance Business Account at end of year as shown in the Balance-Sheet :					Transferred from Appropriation Account.				
Balances									
Additional Reserve (if ~~any~~)									

Notes.

(*a*) This heading must include all expenses directly incurred in settling claims.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(*c*) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in British India and claimants outside British India, and for premiums derived from business effected in British India and effected outside British India must be given.

(*d*) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

*Where the account is furnished under the provisions of clause (*b*) of sub-section (*2*) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within British India and business out of British India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

FORM F.

Form of Revenue Account applicable to Fire Insurance Business and to Accident and Miscellaneous Insurance Business including Workmen's Compensation and Motor Car Insurance Business.

Revenue Account of for the year ended 19
in respect of Business.

	Rs.		Rs.
*Claims under Policies, less Re-insurances (*a*) (*d*) :		Balance of Account at beginning of the year :	
Paid during the year .. Rs.		Reserve for Unexpired Risks Rs.	
Total estimated liability in respect of outstanding claims at end of the year whether due or intimated: Rs.		Additional Reserve (if any) Rs.	
Total ..		*Premiums, less Re-insurances (*d*) ..	
Less—Outstanding at end of previous year (*b*) .. Rs.		Interest, Dividends and Rents Rs.	
*Commission		Less—Income-tax thereon .. Rs.	
*Expenses of Management (*c*)		*Other Income (to be specified) (*e*) ..	
*Bad Debts		Loss transferred to Profit and Loss Account ..	
United Kingdom, Foreign and Dominion Taxes		Transferred from Appropriation Account	
*Other Expenditure (to be specified) ..			
Profit transferred to Profit and Loss Account			
Balance of Account at the end of the year as shown in the Balance-Sheet:			
Reserve for Unexpired Risks, being per cent. of premium income of year .. Rs.			
Additional Reserve (if any) . Rs.			
Rs.		Rs.	

Notes.

(*a*) This heading must include all expenses directly incurred in settling claims.

(*b*) If in any year the claims actually paid and those still unpaid at the end of that year in respect of the previous year or years are in excess of the amount included in the previous year's Revenue Account as provision for outstanding claims, then the amount of such excess must be shown in the Revenue Account.

(*c*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(*d*) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in British India and claimants outside British India, and for premiums derived from business effected in British India and effected outside British India must be given.

(*e*) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

*Where the account is furnished under the provisions clause (b) of sub-section (2) of Section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within British India and business out of British India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

THE FOURTH SCHEDULE.

(*See* Section 13.)

Regulations for the preparation of Abstracts of Actuaries' Reports and Requirements applicable to such Abstracts.

PART I.

Regulations.

1. Abstracts and Statements must be so arranged that the numbers and letters of the paragraphs correspond with those of the paragraphs of Part II of this Schedule.

2. In showing the proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, in accordance with the requirements of paragraph 3 of Part II of this Schedule, no credit is to be taken for any adjustments made in order to secure that no policy is treated as an asset.

3. (*1*) The average rate of interest yielded in any year by the assets constituting a life insurance fund shall, for the purposes of paragraph 4 of Part II of this Schedule, be calculated by dividing the interest of the year by the mean fund of the year; and for the purposes of any such calculation the interest of the year shall be taken to be the whole of the interest credited to the life insurance fund during the year after deduction of income-tax charged thereon (any refund of income-tax in respect of expenses of management made during the year being taken into account), and the mean fund of the year shall be ascertained by adding a sum equal to one-half of the amount of the life insurance fund at the beginning of the year to a sum equal to one-half of that fund at the end of the year, and deducting from the aggregate of those two sums an amount equal to one-half of the interest of the year.

(*2*) For the purposes of the calculation aforesaid either—

(*a*) all profits and income arising during the year from sums invested in reversions shall be included in the interest credited to the life insurance fund during the year; or

(*b*) such portion of the life insurance fund as is invested in the purchase of reversions, and the profits and income arising therefrom, shall be excluded from the calculation; but in that case a statement must be added to the information required under the said paragraph 4, showing, in respect of the portion of the fund so excluded as aforesaid, the average rate of annual profit and income for which credit has been taken during the five years last preceding the valuation date, and explaining the manner in which the said average rate has been calculated.

(*3*) The information given in accordance with the requirements of the said paragraph 4 shall show clearly by which of the methods hereinbefore in this regulation mentioned the sums invested in reversions and the profits and income arising therefrom have been dealt with.

4. Every abstract prepared in accordance with the requirements of Part II of this Schedule shall be signed by an actuary and shall contain a certificate by him to the effect that he has satisfied himself as to the accuracy of the valuations made for the purposes thereof and of the valuation data :

Provided that in the case of an abstract prepared on behalf of an insurance company, if the actuary who signs the abstract is not a permanent officer of the company, the certificate as to the accuracy of the valuation data shall be given and signed by the principal officer of the company and the actuary shall include in the abstract a statement signed by him showing what precautions he has taken to ensure the accuracy of the data.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely :—

"extra premium" means a charge for any risk not provided for in the minimum contract premium;

"inter-valuation period" means, as respects any valuation, the period to the valuation date of that valuation from the valuation date of the last preceding valuation in connexion with which an abstract was prepared under this Act or under the enactments repealed by this Act, or, in a case where no such valuation has been made in respect of the class of business in question, from the date on which the insurer began to carry on that class of business;

"maturity date" means the fixed date on which any benefit will become payable either absolutely or contingently ;

"net premiums" means as respects any valuation the premiums taken credit for in the valuation ;

"premium term" means the period during which premiums are payable;

"valuation date" means as respects any valuation the date as at which the valuation is made.

PART II.

Requirements applicable to an Abstract in respect of Life Insurance Business.

The following tabular statements shall be annexed to every abstract prepared in accordance with the requirements of this Part of this Schedule, namely :—

(*a*) a Consolidated Revenue Account, in the Form G annexed to this Part of this Schedule, for the inter-valuation period (except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business) ; and

(*b*) a Summary and Valuation in the Form H annexed to this Part of this Schedule of the policies included at the valuation date in the class of business to which the abstract relates ; and

(*c*) a Valuation Balance-Sheet in the Form I annexed to this Part of this Schedule ; and

(*d*) a statement in Form DDD as set forth in Part II of the Third Schedule of the additions to and deductions from the number of policies and the sums insured thereunder for each class of life insurance ; and

(*e*) a statement in Form DDDD as set forth in Part II of the Third Schedule of particulars of policies forfeited or lapsed under each class of life insurance ;

and every such abstract shall show—

1. The valuation date.

2. The general principles and full details of the methods adopted in the valuation of each of the various classes of insurances and annuities shown in the said Form H, including statements on the following points :—

(*a*) whether the principles were determined by the instruments constituting the company or by its regulations or bye-laws or how otherwise ;

(*b*) the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated for the purpose of the valuation ;

(c) the methods by which the valuation age, period from the valuation date to the maturity date, and the future premium terms, have been treated for the purpose of the valuation ;

(*d*) the rate of bonus taken into account where by the method of valuation definite provision is made for the maintenance of a specific rate of bonus ;

(*e*) the method of allowing for—

(*i*) the incidence of the premium income ; and

(*ii*) premiums payable otherwise than annually ;

(*f*) the methods by which provision has been made for the following matters, namely :—

(*i*) the immediate payment of claims ;

(*ii*) future expenses and profits in the case of limited payment and paid-up policies ;

(*iii*) the reserve in respect of lapsed policies, not included in the valuation, but under which a liability exists or may arise ; and whether any reserves have been made for the matters aforesaid ;

(*g*) whether under the valuation method adopted any policy would be treated as an asset, and, if so, what steps, if any, have been taken to eliminate such asset ;

(*h*) a statement of the manner in which policies on under-average lives and policies subject to premiums which include a charge for climatic, military or other extra risks have been dealt with ; and

(*i*) the rates of exchange at which liabilities in respect of policies issued in foreign currencies have been converted into rupees and what provision has been made for possible increase of liability arising from future variations in the rates of exchange.

3. The table of mortality used, and the rate of interest assumed, in the valuation.

4. The proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums separately specified in respect of insurances with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits.

5. The average rates of interest yielded by the assets, whether invested or uninvested, constituting the life insurance fund for each of the years covered by the valuation date.

6. The basis adopted in the distribution of profits as between the insurer and policy-bolders, and whether such basis was determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise.

7. The general principles adopted in the distribution of profits among policy-holders, including statements on the following points, namely :—

(*a*) Whether the principles were determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise ;

(*b*) the number of years' premiums to be paid, period to elapse and other conditions to be fulfilled before a bonus is allotted ;

(*c*) Whether the bonus is allotted in respect of each year's premium paid, or in respect of each completed calendar year or year of assurance or how otherwise ; and

(*d*) whether the bonus vests immediately on allocation, or, if not, the conditions of vesting.

8. (*1*) The total amount of profits arising during the inter-valuation period, including profits paid away and sums transferred to reserve funds or other accounts during that period, and the amount brought forward from the preceding valuation (to be stated separately) and the allocation of such profits—

(*a*) to interim bonus paid ;

(*b*) among policy-holders with immediate participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(*c*) among policy-holders with deferred participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(*d*) among policy-holders in the discounted bonus class, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses) ;

(*e*) to the insurer or, in the case of an insurance company, among shareholders or to shereholders' accounts (any such sums passed through the accounts during the inter-valuation period to be separately stated) ;

(*f*) to every reserve fund or other fund or account (any such sums passed through the accounts during the inter valuation period to be separately stated) ;

(*g*) as carried forward unappropriated.

(*2*) Specimens of bonuses allotted as at the valuation date to policies for one thousand rupees—

(*a*) for the whole term of life effected at the respective ages of 20, 30 and 40, and having been in force respectively for five years, ten years and upwards at intervals of ten years; and

(*b*) for endowment insurances effected at the respective ages of 20, 30 and 40, for endowment terms of fifteen, twenty and thirty years, and having been in force respectively for five years, ten years and upwards at intervals of ten years ;

together with the amounts apportioned under the various manners in which the bonus is receivable.

9. A statement in Form J annexed to this Part of this Schedule of specimen policy reserve values held or required to be held according to the methods adopted in the valuation, and specimen minimum surrender values in respect of whole life insurance policies for Rs. 1,000 with premiums payable throughout life effected at the respective ages of 20, 30, 40 and 50, and immediately on payment of the first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, fifteenth and twentieth annual premium; with similar specimen policy reserve values and specimen surrender values in respect of whole life insurance policies subject to premiums payable for 20 years and of endowment insurance policies maturing at age 55.

10. A statement showing how the liability under any disability clause in a policy has been determined in the valuation with full information of the tables of sickness or accident used for the purpose.

FORM G.

Consolidated Revenue Account of for years commencing and ending

	Business within India.	Total		Business within India.	Total.
	Rs.	Rs.		Rs.	Rs.
Claims under Policies (including provision for claims due or intimated) less Re-insurances			Balance of Life Insurance Fund at the beginning of the period		
By death			Premiums, less Re-insurance.		
By maturity			Consideration for Annuities Granted, less Re-insurances (*b*)		
Annuities, less Re-insurances.			Interest, Dividends and Rents .. Rs.		
Surrenders (including Surrenders of Bonuses), less Re-insurances			Less—Income-tax thereon (*c*) .. Rs.		
Bonuses in Cash, less Re-insurances					
Bonuses in Reduction of Premiums, less Re-insurances.			Registration Fees		
Commission (less that on Re-insurances)			Other Income (to be specified).		
Expenses of Management (*a*)— Agents' and Canvassers' allowance			Loss transferred to Profit and Loss Account		
Salaries, &c. (other than to Agents and Canvassers) ..			Transferred from Appropriation Account		
Travelling expenses ..					
Directors' fees					
Auditors' fees					
Medical fees					
Law charges					
Advertising					
Printing and Stationery ..					
Other expenses of management (accounts to be specified)					
Other payments (accounts to be specified)					
Rents for offices belonging to and occupied by the company					
Rents of other offices occupied by the company ..					
United Kingdom, British Indian, Dominion and Foreign Taxes					
Bad Debts					
Other Expenditure (to be specified)					
Profit transferred to Profit and Loss Account					
Balance of Life Insurance Fund at end of the period as shown in the Balance-Sheet.					
Rs.			Rs.		

Notes.

(*a*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(*b*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*c*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*d*) In the case of an insurer having his principal place of business outside British India, the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

FORM H.

Summary and Valuation of the Policies of as at 19 .

Description of Transactions.	Particulars of the Policies for Valuation.					Valuation.			
	Number of policies.	Sums Assured	Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Sums Assured and Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Net Liabilities.
DIVISION I.									
Insurances.									
Group A.—									
With immediate participation in profits									
For whole term of life ..									
Other classes (to be specified) ..									
Extra premiums									
Total Insurances									
Deduct—Re-insurances ..									
Net insurances									
Group B.—									
With deferred participation in profits									
For whole term of life ..									
Other classes (to be specified) ..									
Extra premiums									
Total Insurances									
Deduct—Re-insurances ..									
Net insurances									
Group C.—									
Under discounted bonus systems									
For whole term of life ..									
Other classes (to be specified) ..									
Extra premiums									
Total insurances									
Deduct—Re-insurances ..									
Net insurances									
Total insurances with profits ..									
Group D.—									
Without participation in profits ..									
For whole term of life ..									
Other classes (to be specified). .									

FORM H—*concld.*

Summary and Valuation of the Policies of as at 19 .

Description of Transactions.	Particulars of the Policies for Valuation.					Valuation.			
	Number of policies.	Sums Assured	Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Sums Assured and Bonuses.	Office Yearly Premiums.	Net Yearly Premiums.	Net Liabilities.
Extra premiums									
Total insurances									
Deduct—Re-insurances ..									
Net insurances									
Total insurances without profits									
Total of the insurances shown in all groups									
Deduct—Re-insurances ..									
Net amount of insurances ..									
Adjustments, if any (to be separately specified)									
DIVISION II.									
Annuities on Lives.									
Immediate Annuities									
Deferred Annuities with return of premiums									
Deferred Annuities without return of premiums									
Other classes (to be specified) ..									
Total Annuities									
Deduct—Re-insurances ..									
Net Annuities on Lives ..									
Total of the results (after deduction of Re-insurances)									

Notes.

1. Items in this Summary are to be stated to the nearest rupee.

2. No policy of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, is to be included in Groups A, B, C or D of this Form : any such policies must be shown in a separate Group which must be added to the Form.

3. If policies without participation in profits but with a guaranteed rate of bonus are issued they must be separately specified in Group D of this Form.

4. Policies under which there is a waiver of premiums during disability must be shown as a separate class.

5. Separate forms must be prepared in respect of classes of policies valued by different tables of mortality or at different rates of interest or involving the valuation of net premiums on different bases.

6. In cases where separate valuations of any portion of the business are required under local laws in places outside British India and reserves based on such valuations are deposited in such places, a statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place with a statement as to such bases respectively.

7. Office and net premiums and the values thereof must be shown after deduction of abatements made by the application of bonus.

FORM I.

Valuation Balance-Sheet of as at 19 .

	Rs.		Rs.
Net liability under business as shown in the Summary and Valuation of Policies		Balance of Life Insurance Fund as shown in the Balance-Sheet	
Surplus, if any		Deficiency, if any	
	——		——

Note.—If the proportion of surplus allocated to the insurer, or in the case of an insurance company to share holders, is not uniform in respect of all classes of insurances, the surplus must be shown separately for the classes to which the different proportions relate.

FORM J.

Specimen policy reserve values and minimum surrender values under a policy for Rs. 1,000.

Number of premiums paid.	Age at entry 20.		Age at entry 30.		Age at entry 40.		Age at entry 50.	
	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.	Reserve value.	Minimum surrender value.
1.								
2.								
3.								
4.								
5.								
6.								
7.								
8.								
9.								
10.								
15.								
20.								

Note.—Items in this Form to be stated to the nearest rupee.

THE FIFTH SCHEDULE.

(*See* section 13.)

Regulations for preparing statements of business in force and requirements applicable to such statements.

PART I.

Regulations.

1. Statements prepared under this Schedule must be prepared, so far as practicable, in tabular form and must be identified by numbers and letters corresponding with those of the paragraphs of Part II of this Schedule.

2. Except with respect to rates of premium or contribution, items in statements prepared under this Schedule are to be shown to the nearest rupee.

3. Extra premium shown in the forms of Summary and Valuation prepared under the Fourth Schedule to this Act must not be included in statements prepared under this Schedule.

4. Every statement prepared under this Schedule shall be signed by the actuary making the investigation in connection with which it is prepared.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "annual loading" means the provision made for future expenses and profits;

(*b*) "extra premiums" means a charge for any risk not provided for in the minimum contract premium;

(*c*) "net premiums" means the premiums taken credit for in the valuation in connection with which any statement is prepared; and

(*d*) "valuation date" means as respects any valuation the date as at which the valuation is made.

PART II.

Requirements for statements applicable to Life Insurance Business.

The statements required to be prepared under this Part of this Schedule are as follows, namely:—

1. Statements, separately prepared in respect of policies with and without participation in profits, showing—

(*a*) as respects policies for the whole term of life, the rates of office premiums charged, in accordance with the published tables in use, for new policies giving the rates for decennial ages at entry from 20 to 70 inclusive; and

(*b*) as respects endowment insurance policies, the rates of office premiums charged, in accordance with the published tables in use, for new policies with original terms of ten, fifteen, twenty, thirty and forty years, giving the rates for decennial ages at entry from 20 to 40 inclusive, but excluding policies under which the age at maturity exceeds 60.

2. Statements, separately prepared in respect of policies with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits, showing in quinquennial groups—

(*a*) as respects policies for the whole term of life—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped according to ages attained;

(*ii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable throughout life, and of the corresponding net premiums, grouped according to ages attained; and

(*iii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable for a limited number of years, and, either, the corresponding net premiums grouped in accordance with the grouping adopted for the purposes of the valuation, or, the annual loading reserved for the remaining duration of the policies, grouped according to ages attained;

(*b*) as respects endowment insurance policies—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped in accordance with the grouping adopted for the purposes of the valuation; and

(*ii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable, and of the corresponding net premiums, grouped in accordance with the grouping adopted for the purposes of the valuation:

Provided that—

(*a*) as respects endowment insurance policies which will reach maturity in less than five years, the information required by sub-paragraph (*b*) (*i*) of this paragraph must be given for each year instead of in quinquennial groups; and

(*b*) where the office premiums payable under policies for the whole term of life for a limited number of years, or the office premiums payable under endowment insurance policies, or the corresponding net premiums, are grouped for the purposes of the valuation otherwise than according to the number of years' payments remaining to be made, or, where the sums assured under endowment insurance policies are grouped for the purposes of the valuation otherwise than according to the years in which the policies will mature for payment or in which they are assumed to mature if earlier than the true year, then, in any such case the valuation constants and an explanation of the method by which they are calculated must be given for each group, and in the case of the sums assured under endowment insurance policies a statement must also be given of the amount assured maturing for payment

in each of the two years following the valuation date.

3. Statements as respects any policies in force under which premiums cease to be payable, whether permanently or temporarily, during disability arising from sickness or accident, showing the total amount of the office premiums payable.

4. Statements as respects immediate annuities on single lives for the whole term of life, separately prepared in respect of annuities on male and female lives, showing in quinquennial age groups the total amount of such annuities.

5. Statements as respects deferred annuities, separately prepared in respect of annuities on male and female lives, showing the specimen reserve values for annuities of one hundred rupees which will be produced on maturity on the basis of valuation adopted at ages, in the case of male lives, 60 and 65, and in the case of female lives, 55 and 60 ; the said statements must show the specimen reserve values which will be produced under the table of annual premiums in use for new policies, and if under any other table of annual premiums in use for any other deferred annuity policies in force smaller reserve values will be produced, the like specimens of these must also be given.

6. Statements as respects any policies of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, showing the total claims paid since the date as at which the last statements were prepared under this Part of this Schedule or, where no such statements have been prepared, since the date on which the insurer began to carry on the class of business to which the statements relate, and the reserve for unexpired risks and outstanding claims.

THE SIXTH SCHEDULE.

(*See* section 55.)

Rule as to the valuation of the Liabilities of an Insurer in Insolvency or Liquidation.

The liabilities of an insurer in respect of current contracts effected in the course of life insurance business including annuity business, shall be calculated by the method and upon the basis to be determined by an actuary approved by the Court, and the actuary so approved shall, in determining as aforesaid, take into account—

(*a*) the purpose for which such valuation is to be made,

(*b*) the rate of interest and the rates of mortality and sicknees to be used in valuation, and

(*c*) any special directions which may be given by the Court.

The liabilities of an insurer in respect of current policies other than life policies shall be such portion of the last premium paid as is proportionate to the unexpired portion of the policy in respect of which the premium was paid.

ACT No. V OF 1938.

Manœuvres, Field Firing and Artillery Practice Act, 1938.

[Received G. G's assent on 12th March 1938.]

An Act to provide facilities for military manœuvres and for field firing and artillery practice.

WHEREAS it is expedient to provide facilities for military manœuvres and for field firing and artillery practice ; It is hereby enacted as follows :

Short title and extent.

1. *(1)* This Act may be called the Manœuvres, Field Firing and Artillery Practice Act, 1938.

(2) It extends to the whole of British India.

CHAPTER I.

MANOEUVRES.

Power of Provincial Government to authorize manœuvres.

2. *(1)* The Provincial Government may, by notification in the local official Gazette, authorize the execution of military manœuvres over any area specified in the notification during a specified period not exceeding three months :

Provided that the same area or any part thereof shall not ordinarily be so specified

more than once in any period of three years.

(2) The Provincial Government shall publish notice of its intention to issue a notification under sub-section *(1)* as early as possible in advance of the issue of the notification, and no such notification shall be issued until the expiry of three months from the date of the first publication of such notice in the local official Gazette.

(3) The notice required by sub-section *(2)* shall be given by publication in the local official Gazette and shall also be given throughout the area which it is proposed to specify in the notification by publication in the manner prescribed by rules made under section 13, and shall be repeated by like publication one month and one week as nearly as may be before the commencement of the manœuvres.

Powers exercisable for purposes of manœuvres.

3. *(1)* Where a notification under sub-section *(1)* of section 2 has been issued, such persons as are included in the military forces engaged in the manœuvres may, within the specified limits and during the specified periods,—

(a) pass over, or encamp, construct military works of a temporary character, or execute military manœuvres on, the area specified in the notification, and

(b) supply themselves with water from any source of water in such area :

Provided that nothing herein contained shall authorize the taking of water from any source of supply, whether belonging to a private owner or a public authority, of an amount in excess of the reasonable requirements of the military forces or of such amount as to curtail the supply ordinarily required by those entitled to the use of such water supply.

(2) The provisions of sub-section *(1)* shall not authorize entry on or interference with any well or tank held sacred by any religious community or any place of worship or ground attached thereto except for the legitimate purpose of offering prayers or any place or building reserved or used for the disposal of the dead, or any dwelling house or premises attached thereto or any educational institution, factory, workshop or store or any premises used for the carrying on of any trade, business or manufacture or any garden or pleasure ground, or any ancient monument as defined in section 2 of the Ancient Monuments Preservation Act, 7 of 1904.

Duty of Officer Commanding to repair damage.

4. The Officer in Command of the military forces engaged in the manœuvres shall cause all lands used under the powers conferred by this Chapter to be restored, as soon and as far as practicable, to their previous condition.

Right to compensation for damage caused by manœuvres.

5. Where a notification issued under section 2 authorizes the execution of military manœuvres compensation shall be payable from the Defence Estimates for any damage to person or property or interference with rights or privileges arising from such manœuvres including expenses reasonably incurred in protecting person, property, rights and privileges.

Method of assessing compensation.

6. *(1)* The Collector of the district in which any area utilized for the purpose of manœuvres is situated shall depute one or more Revenue Officers to accompany the forces engaged in the manœuvres for the purpose of determining the amount of any compensation payable under section 5.

(2) The Revenue Officer shall consider all claims for compensation under s. 5 and determine, on local investigation and where possible after hearing the claimant, the amount of compensation, if any, which shall be awarded in each case ; and shall disburse on the spot to the claimant the compensation so determined as payable.

(3) Any claimant, dissatisfied with a refusal of the Revenue Officer to award him compensation or with the amount of compensation awarded to him by the Revenue Officer, may, at any time within fifteen days from the communication to him of the decision of the Revenue Officer, give notice to the Revenue Officer of his intention to appeal against the decision.

(4) Where any such notice has been given, the Collector of the district shall constitute a commission consisting of himself as chairman, a person nominated by the Officer Commanding the forces engaged in the manœuvres and two persons nominated by the District Board, and the commission shall decide all appeals of which notice has been given.

(5) The commission may exercise its powers notwithstanding the absence of any member of the commission, and the chair-

man of the commission shall have a casting vote in the case of an equal division of opinion.

(6) The decision of the commission shall be final and no suit shall lie in any Civil Court in respect of any matter decided by the commission.

(7) No fee shall be charged in connexion with any claim, notice, appeal, application or document filed before the Revenue Officer, Collector or the commission under this section.

Offences.

7. If, within the area and during the period specified in a notification under sub-section *(1)* of section 2, any person—

(a) wilfully obstructs or interferes with the execution of the manœuvres, or

(b) without due authority enters or remains in any camp, or

(c) without due authority interferes with any flag or mark or any apparatus used for the purposes of the manœuvres,

he shall be punishable with fine which may extend to ten rupees.

CHAPTER II.

FIELD FIRING AND ARTILLERY PRACTICE.

Definitions.

8. In this Chapter—

(a) "field firing" includes air armament practice ;

(b) "notified area" means an area defined in a notification issued under sub-section *(1)* of section 9.

Power of Provincial Government to authorize field firing and artillery practice.

9. *(1)* The Provincial Government may, by notification in the local official Gazette, define any area as an area within which for a specified term of years the carrying out periodically of field firing and artillery practice may be authorised.

(2) The Provincial Government may, by notification in the local official Gazette, authorise the carrying out of field firing and artillery practice throughout a notified area or any specified part thereof during any period or periods specified in the notification.

(3) Before any notification under sub-section *(2)* is issued, the Provincial Government shall publish notice of its intention to issue such notification as early as possible in advance of the issue of the notification, and no such notification shall be issued until the expiry of two months from the date of the first publication of the notice in the local official Gazette.

(4) The notice required by sub-section *(3)* shall be given by publication in the local official Gazette and shall also be given throughout the notified area by publication in some newspaper circulating in and in the language commonly understood in that area and by beat of drum and by affixation in all prominent places of copies of the said notice in the language of the locality and in such other manner as may be prescribed by rules made under section 13 and shall be repeated by like publication one week as nearly as may be before the commencement of the period or of each period specified in the notification :

Provided that the fact of the said beat of drum and affixation shall be verified in writing by one headman and two other literate inhabitants of the locality and provided further that such notice by the beat of drum shall be given seven and two days as nearly as may be before the commencement of such field firing and artillery practice.

Powers exercisable for purposes of field firing and artillery practice.

10. *(1)* Where a notification under sub-section *(2)* of section 9 has been issued, such persons as are included in the forces engaged in field firing or artillery practice may, within the notified area or specified part thereof during the specified period or periods,—

(a) carry out field firing and artillery practice with lethal missiles, and

(b) exercise, subject to the provisions of sections 3 and 4, any of the rights conferred by section 3 on forces engaged in military manœuvres :

Provided that the provisions of sub-section *(2)* of section 3 shall not debar entry into, or interference with, any place specified in that sub-section, if it is situated in an area declared to be a danger zone under sub-section *(2)* of this section, to the extent that may be necessary to ensure the exclusion from it of persons and domestic animals :

Provided further that in the case of a dwelling house occupied by women adequate warning shall be given through a local inhabitant and entry shall be effected after such warning in the presence of two respectable inhabitants of the locality.

(2) The Officer Commanding the forces engaged in any such practice may, within the notified area or specified part thereof, declare any area to be a danger zone, and thereupon the Collector shall, on application made to him by the Officer Commanding the forces engaged in the practice, prohibit the entry into and secure the removal from such danger zone of all persons and domestic animals during the times when the discharge of lethal missiles is taking place or there is danger to life or health.

Compensation.

11. The provisions of sections 5 and 6 shall apply in the case of field firing and artillery practice as they apply in the case of military manœuvres :

Provided that the compensation payable under this section shall include compensation for exclusion or removal from any place declared to be a danger zone of persons or domestic animals, such compensation to be disbursed at not less than the minimum rates prescribed by rules made under section 13 before the exclusion or removal is enforced, and shall also include compensation for any loss of employment or deterioration of crops resulting from any such exclusion or removal.

Offences.

12. If, during any period specified in a notification issued under sub-section *(2)* of section 9, any person within a notified area—

(a) wilfully obstructs or interferes with the carrying out of field firing or artillery practice, or

(b) without due authority enters or remains in any camp, or

(c) without due authority enters or remains in any area declared to be a danger zone at a time when entry thereto is prohibited, or

(d) without due authority interferes with any flag or mark or target or any apparatus used for the purposes of the practice,

he shall be punishable with fine which may extend to ten rupees.

CHAPTER III.

GENERAL.

Power to make rules.

13. The Provincial Government may, by notification in the local official Gazette, make rules—

(a) prescribing the manner in which the notices required by sub-section *(2)* of section 2 and sub-section *(3)* of section 9 shall be published in the areas concerned;

(b) regulating the use under this Act of land for manœuvres or field firing and artillery practice in such manner as to secure the public against danger and to enable the manœuvres or practice to be carried out without interference and with the minimum inconvenience to the inhabitants of the areas affected;

(c) regulating the procedure of the Revenue Officers and commissions referred to in section 6 in such manner as to secure due publicity regarding the method of making claims for compensation and preferring appeals from original awards of compensation, the expeditious settlement of claims and of appeals and the payment of compensation so far as possible direct to the claimants; and

(d) defining the principles to be followed by the Revenue Officers and commissions referred to in section 6 in assessing the amount of compensation to be awarded.

ACT No. VI OF 1938.

Destructive Insects and Pests (Amendment) Act, 1938.

[Received G. G.'s assent on 12th March 1938].

An Act further to amend the Destructive Insects and Pests Act, 1914, for certain purposes.

WHEREAS it is expedient further to amend the Destructive Insects and Pests Act, 2 of 1914, for the purposes hereinafter appearing: It is hereby enacted as follows:

Short title.

1. This Act may be called the Destructive Insects and Pests (Amendment) Act 1938.

Amendment of long title and preamble, Act 2 of 1914.

2. In the long title and preamble of the Destructive Insects and Pests Act 2 of 1914 (hereinafter referred to as the said Act), after the word "into" the words "and the transport from one province to another in" shall be inserted.

Amendment of section 2, Act 2 of 1914.

3. In clause (*a*) of section 2 of the said Act, for the words "and trees or bushes" the words "and all trees, bushes or plants" shall be substituted.

Amendment of section 3, Act 2 of 1914.

4. In section 3 of the said Act,

(*a*) to sub-section (*1*) the words "or of insects generally or any class of insects" shall be added; and

(*b*) in sub-section (*2*) after the word "articles" the words "or any insect or class of insects" shall be inserted.

Insertion of new sections 4A, 4B, 4C and 4D in Act 2 of 1914.

5. After section 4 of the said Act the following sections shall be inserted, namely :

Power of Central Government to regulate or prohibit transport from province to province of insects or articles likely to infect.

"4A. The Central Government may, by notification in the Official Gazette, prohibit or regulate, subject to such conditions as the Central Government may impose, the export from a province or the transport from one province to another province in British India of any article or class of articles likely to cause infection to any crop or of insects generally or any class of insects.

Refusal to carry article of which transport is prohibited.

4B. When a notification has been issued under the section 4A, then, notwithstanding any other law for the time being in force, the person responsible for the booking of goods or parcels at any railway station or inland steam vessel station,—

(*a*) where the notification prohibits export or transport, shall refuse to receive for carriage at, or to forward or knowingly allow to be carried on, the railway or inland steam vessel from that station anything, of which import or transport is prohibited, consigned to any place in British India outside the province in which such station is situate; and

(*b*) where the notification imposes conditions upon export or transport, shall so refuse, unless the consignor produces, or the thing consigned is accompanied by, a document or documents of the prescribed nature showing that those conditions are satisfied.

Application of section 4B to articles exported to Indian States.

4C. Where, by or under any law in force in the territories of any Indian State, the import into that State of any article likely to cause infection to any crop or of any insect has been prohibited, the Central Government may, by notification in the Official Gazette, declare that the provisions of section 4B shall apply in respect of any such article or insect consigned from any place in British India to any place in that State:

Provided that such Indian State prohibits the export to British India of any article or insect or class of insects the import of which into British India has been prohibited by the Central Government.

Power of Central Government to make rules.

4D. The Central Government may, by notification in the Official Gazette, make rules prescribing the nature of the documents which shall accompany any article or insect the export or transport whereof is subject to conditions imposed under section 4A, or which shall be held by the consignor or consignee thereof, the authorities which may issue such documents and the manner in which the documents shall be employed:

Provided that the said notification shall be placed, as soon as may be, on the table of both chambers of the Central Legislature."

Amendment of section 5, Act 2 of 1914.

6. In sub-section *(1)* of section 5 of the said Act, after the word "destruction" the words "of any insect or class of insects or" shall be inserted and after the word and figure "section 3" the words, figure and letter "or under section 4A" shall be inserted.

Insertion of new section 5A in Act 2 of 1914.

7. After section 5 of said Act the following section shall be inserted, namely—

Penalties.

"5A. Any person who knowingly exports any article or insect from a province or transports any article or insect from one province to another in British India in contravention of a notification issued under section 4A, or attempts so to export or transport any article or insect, or exports or attempts to export from British India to an Indian State any article or insect in respect of which a notification under section 4C has been issued, and any person

responsible for the booking of goods or parcels at a railway or inland steam vessel station who knowingly contravenes the provisions of section 4B shall be punishable with fine which may extend to two hundred and fifty rupees and, upon any subsequent conviction, with fine which may extend to two thousand rupees."

ACT NO. VII OF 1938.

Child Marriage Restraint (Amendment) Act, 1938.

[Recd. G. G.'s assent on 12th March 1938.]

An Act to amend the Child Marriage Restraint Act, 1929.

WHEREAS it is expedient to amend the Child Marriage Restraint Act, 19 of 1929: It is hereby enacted as follows:—

Short title.

1. This Act may be called the Child Marriage Restraint (Amendment) Act, 1938.

Amendment of section 1, Act 19 of 1929.

2. To sub-section *(2)* of section 1 of the Child Marriage Restraint Act, 19 of 1929, the following shall be added, namely—

"and applies also to—

(a) all British subjects and servants of the Crown in any part of India; and

(b) all British subjects who are domiciled in any part of India wherever they may be."

Notes.—The amendment explains to what all persons the Act applies.

The Indian Finance Act, 1938

[Certified by G. G. on 26th March 1938.]

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 6 of 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. *(1)* This Act may be called the Indian Finance Act, 1938.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Salt duty.

2. The provisions of section 7 of the Indian Salt Act, 12 of 1882, shall, in so far as they enable the Governor General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India be construed as if, for the year beginning on the 1st day of April, 1938, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Inland postage rates.

3. For the year beginning on the 1st day of April 1938, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 6 of 1898, as the First Schedule to that Act.

Income-tax and super-tax.

4. *(1)* Income-tax for the year beginning on the 1st day of April 1938, shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April 1937.

(2) The rates of super-tax for the year beginning on the 1st day of April 1938, shall, for the purposes of section 55 of the Indian Income-tax Act, 11 of 1922, be the same rates, increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April 1937.

(3) For the purposes of sub-section *(1)* "total income" means total income as deter-

mined in accordance with the provisions of the Indian Income-tax Act, 11 of 1922.

THE SCHEDULE

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 3.]

"THE FIRST SCHEDULE

INLAND POSTAGE RATES

[*See* section 7.]

Letters.

For a weight not exceeding one tola	One anna.
For every tola, or fraction thereof, exceeding one tola ...	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ...	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas...	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	Half an anna.

Parcels.

For a weight not exceeding forty tolas	Four annas.
For every forty tolas, or fraction thereof, exceeding 40 tolas ...	Four annas."

ACT NO. VIII OF 1938.

The Tea Control Act, 1938

[Received G. G.'s assent on 28th March 1938.]

An Act to provide for the control of the export of tea from, and for the control of the extension of the cultivation of tea in British India.

WHEREAS it is expedient, for the purpose of implementing the agreement which the Central Government has entered into with the Governments of Ceylon and the Netherlands India to give effect to the provisions of the International Agreement made between associations representing the tea growers of India, Ceylon and the Netherlands India, to provide for the control of the export of tea from, and for the control of the extension of the cultivation of tea in British India ; It is hereby enacted as follows :

Short title, extent, commencement and duration.

1. *(1)* This Act may be called the Indian Tea Control Act, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of April, 1938.

(4) It shall remain in force only up to the 31st day of March, 1943.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(a) "Committee" means the Indian Tea Licensing Committee constituted under this Act ;

(b) " Customs-collector " means a Customs-collector as defined in clause *(c)* of section 3 of the Sea Customs Act, 8 of 1878, for the purposes of that Act, or of that Act, as applied to the import and export of goods by air, or a Collector of Land Customs as defined in clause *(c)* of section 2 of the Land Customs Act, 19 of 1924, as the case may be ;

(c) "export" means to take out of British India by land, sea or air to any place outside India other than the French and Portuguese Settlements bounded by India or a country notified in this behalf by the Central Government by notification in the official Gazette ;

(d) "Indian export allotment" means the total quantity of tea which may be exported during any one financial year ;

(e) "owner" includes any agent of an owner ;

(f) "prescribed" means prescribed by rules made under this Act ;

(g) "standard export figure" means a quantity of 383,242,916 pounds *avoirdupois* of tea ;

(h) "tea" means—

(i) in Chapter III and Chapter IV, the plant *Camellia Thea* (Linn.), and

(ii) elsewhere, the commodity known as tea made from the leaves of the plant

Camellia Thea (Linn.), including green tea but excluding tea waste ; and

(*i*) "tea seed" includes seeds, roots, stumps, cuttings, buds, and any living portion of the plant *Camellia Thea* (Linn.), which may be used to propagate that plant.

CHAPTER I.

THE INDIAN TEA LICENSING COMMITTEE.

Constitution of the Indian Tea Licensing Committee.

3. *(1)* The Central Government shall constitute a Committee, to be called the Indian Tea Lisensing Committee, consisting of the following members :

(a) one member to be nominated by each of the following bodies, namely :

(i) the Indian Tea Association, Calcutta,

(ii) the Assam Branch of that Association,

(iii) the Surma Valley Branch of that Association,

(iv) the Dooars Planters Association,

(v) the Indian Tea Planters Association, Jalpaiguri, and the Terai Indian Planters Association, Terai, acting together, and

(vi) the Darjeeling Planters Association and the Terai Planters Association, acting together ;

(b) two members to be elected in the prescribed manner by and from among Indian owners of tea estates to which export quotas were allotted under the Indian Tea Control Act, 24 of 1933, for the financial year beginning on the 1st day of April 1937, one to represent the Indian Tea Planters of the Assam Valley and one to represent the Indian Tea Planters of the Surma Valley, the Indian State of Tripura, the Chittagong Hill Tracts and the District of Chittagong ;

(c) three members to be nominated by the United Planters Association of Southern India, one to represent tea estates in British India, and one to represent tea estates in Indian States ;

(d) one member to be nominated by the Government of the Indian State of Travancore to represent the tea estates in that State ;

(e) one member to be elected in the prescribed manner by and from among Indian owners of tea estates to represent tea estates in Southern India excluding Travancore owned by Indians ; and

(f) one member to be elected by owners of tea gardens of Kangra, Dehra Dun, Kumaon, Behar and other unrepresented Tea Estates.

(2) Within three months after the commencement of this Act, the Central Government shall publish in the official Gazette the names of all members of the Committee, and thereupon the Committee shall be deemed to be constituted.

(3) Until the Committee is constituted as provided in sub-section (2), the Indian Tea Licensing Committee constituted under the Indian Tea Control Act, 24 of 1933, shall be deemed to be the Committee constituted under this section.

Vacancies.

4. *(1)* If any authority or body fails to make within two months any nomination or election which it is entitled to make under section 3, the Central Government may itself nominate a member to fill the vacancy.

(2) Where a member of the Committee dies, resigns, ceases to reside in India or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which is entitled to make the first nomination or election under section 3, or where such recommendation is not made within two months, then on its own initiative, nominate a person to fill the vacancy.

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in or any defect in the constitution of the Committee.

Sub-committees and executive officers.

5. The Committee shall elect a chairman from amongst its members, and may appoint such sub-committees and executive officers as may be necessary for the efficient performance of the duties imposed upon it by this Act.

Power to make by-laws.

6. *(1)* The Committee may make by-laws consistent with this Act and with the rules made thereunder for all or any of the following matters, namely :

(a) the regulation of the procedure to be followed at meetings of the Committee ;

(b) the appointment of sub-committees ;

(c) the delegation to sub-committees, members or officers of the Committee of any of the powers of the Committee under this Act ;

(d) the determination of the travelling allowances of the members or officers of

the Committee or of the members of a sub-committee ;

(e) the appointment, promotion and dismissal of officers, assessors and servants of the Committee, and the creation and abolition of appointments of such officers, assessors and servants ;

(f) the regulation of the grant of pay and leave to such officers, assessors and servants ; and

(g) any other matter in respect of which by-laws may be made under this Act or the rules made thereunder.

(2) All by-laws made under this section shall be subject to the previous sanction of the Central Government.

Central Government's power of control.

7. *(1)* Save in respect of proceedings and orders under sections 28, 29 and 30, all acts of the Committee shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any such act.

(2) Without prejudice to the generality of the foregoing provision, any person aggrieved by any order of the Committee under section 14 may appeal to either the Central Government or the High Court of the Province within which the tea estate is situated within sixty days from the date of such order :

Provided that an appeal preferred to the Central Government or the High Court shall bar an appeal against the same order to the other.

(3) The records of the Committee shall be open to inspection at all reasonable times by any officer authorized in this behalf by the Central Government.

(4) Subject to rules framed under the Act every owner of a tea estate to whom a quota is allotted shall be entitled to inspect the records of the Committee and on payment of the prescribed fee shall also be entitled to obtain copies of any proceedings or orders of the Committee.

Keeping and auditing of accounts.

8. *(1)* The Committee shall publish an annual report and shall keep accounts of all fees received by it under this Act and of the manner in which they are expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually by auditors appointed in this behalf by the Central Government, and such auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed under sub-section (2), an appeal shall lie to the Central Government whose decision shall be final.

Dissolution of the Committee.

9. *(1)* The Central Government may, by notification in the official Gazette, declare the Committee to be dissolved, and on the date of the publication of any such notification the Committee shall stand dissolved and this Act shall be deemed to be repealed.

(2) When the Committee is dissolved either under this section or by the expiry of this Act, the unexpended balance of fees received by the Committee under this Act shall lapse to the Central Government.

Power to make rules.

10. The Central Government may, by notification in the official Gazette, make rules—

(a) providing for the conduct of the elections referred to in clauses *(b)* and *(e)* of sub-section *(1)* of section 3 ;

(b) providing for the establishment and maintenance of offices by the Committee ;

(c) providing for the conduct of business by the Committee and determining the number of members which shall form a quorum at meetings ;

(d) providing for the maintenance by the Committee of a record of all business transacted and for submission of copies thereof to the Central Government ;

(e) regulating the preparation of annual estimates of receipts and expenditure ;

(f) regulating the keeping of accounts of receipts and expenditure ;

(g) determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus money at the credit of the Committee may be deposited at interest ;

(h) regulating the term of office of members of the Committee and the circumstances in which and the authority by which members may be removed ; and

(i) generally, to carry out the provisions of this Chapter.

CHAPTER II.

CONTROL OVER THE EXPORT OF TEA.

Limitation of application of Chapter.

11. Nothing in this Chapter shall apply to tea—

(a) proved to the satisfaction of the Customs-collector to have been imported into British India from any port outside India, or

(b) shipped as stores on board any vessel, in such quantity as the Customs-collector considers reasonable having regard to the number of the crew and passengers and the length of the voyage on which the vessel is about to depart, or

(c) exported by post in packages not exceeding one pound *avoirdupois* in weight.

Control of export of tea and tea seed.

12. *(1)* No tea shall be exported unless covered by a licence issued by or on behalf of the Committee.

(2) No tea shall be taken by land, sea or air out of British India to any of the French or Portuguese Settlements bounded by India unless covered by a permit issued by or on behalf of the Committee.

(3) No tea seed shall be exported unless covered by a permit issued by or on behalf of the Central Government.

Indian export allotment.

13. The Indian export allotment for each financial year during the operation of this Act shall be declared by the Central Government by notification in the official Gazette after consulting the Committee and paying due regard to all interests concerned and shall be expressed as a number of pounds *avoirdupois* equivalent to a stated percentage of the standard export figure.

Export quotas and crop basis.

14. *(1)* Any tea estate or any sub-division of a tea estate to which an export quota was allotted under the Indian Tea Control Act, 24 of 1933, and any tea estate which the Central Government may within one year from the commencement of this Act authorise to apply for the allotment of an export quota under this Act, shall on application made to the Committee for the allotment to the estate of an export quota have the right, subject to the provisions of this Act, to receive an export quota.

(2) The export quota of a tea estate, that is, the total quantity of tea which may be exported by the owner of the tea estate during the financial year, shall be an amount bearing to the crop basis of the estate as determined by the Committee in accordance with the principles set forth in the Schedule the same proportion as the Indian export allotment for the financial year in question bears to the total of the crop basis of all tea estates in India for that year.

(3) The crop basis of a tea estate may be re-determined by the Committee if—

(a) application is made by the owner of the estate in this behalf before the 30th day of September 1938, and

(b) the Committee is satisfied that there exist grounds of special hardship arising out of circumstances not under the control of the owner or of any previous owner of the estate and relating to conditions existing prior to the 1st day of April 1933.

(4) The total of all export quotas allotted to tea estates for any financial year shall not exceed the Indian export allotment for that year.

Right to export licences.

15. *(1)* The owner of a tea estate to which an export quota has been allotted for any financial year shall have a right to obtain at any time during that year export licences to cover the export of tea up to the amount of the unexhausted balance of the quota, that is, up to the amount of the quota less the amount for which export licences have already been issued against it.

(2) The right of the owner of a tea estate under this section may be transferred in whole or in part, and, subject to proof of the transfer to the satisfaction of the Committee and to the completion of the prescribed documents to enable the Committee to give effect to the transfer, the transferee shall have a right to obtain export licences up to the amount covered by the transfer or up to the amount of the unexhausted balance of the quota, whichever may be less.

(3) Subject to the conditions specified in sub-section *(2)*, any transferee referred to in that sub-section may again transfer the whole or any part of his rights to the owner of a tea estate, but not to any other person.

(4) Nothing in sub-section *(3)* shall operate to restrict the issue of licences for the export of tea expressed to be sold with export rights.

Grant of export licences.

16. *(1)* The owner of any tea estate to which an export quota has been allotted or any person to whom he has transferred his rights may at any time before the 21st day of March of the financial year to which the quota relates apply in

writing to the Committee for an export licence covering a stated quantity of tea.

(2) If the unexhausted balance of the quota is sufficient to cover the stated quantity, the Committee shall on receipt of the requisite fee issue an export licence covering the stated quantity.

(3) Every licence shall be in duplicate in the prescribed form, shall bear the date of its issue and shall be valid up to the end of the financial year in which it is issued :

Provided that save as provided in section 17 the Committee shall not date or issue any export licence after the end of the financial year in which the application for it was made.

Special export licences.

17. *(1)* Where the tea covered by an export licence issued under the Indian Tea Control Act, 24 of 1933, has not been exported before the 31st day of March 1938, the person to whom the licence was granted may, before the 14th day of April 1938, forward the licence to the Committee and submit therewith an application for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

(2) Where tea, in respect of which an export licence has been or could have been granted under this Act, has not been exported before the end of the financial year in which the licence was or could have been issued, the person to whom the licence was or could have been granted may, before the 14th day of April of the following financial year, forward an application to the Committee for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

(3) A special export licence shall be in duplicate in the prescribed form, shall bear the date of its issue, and shall be valid in the case of a special export licence issued in the year 1938 up to the 30th day of June of that year and in the case of a special export licence issued in any subsequent year up to the 31st day of May of the year in which it was issued.

(4) The quantity of tea covered by a special export licence shall be accounted for against the export quota of the year in which the original licence was or could have been issued under this Act or under the Indian Tea Control Act, 24 of 1933, as the case may be.

Committee to maintain accounts of quotas.

18. *(1)* The Committee shall maintain an account of every export quota showing, in addition to such other particulars as the Committee may think fit, the licences issued against it and the unexhausted balance.

(2) Any owner of a tea estate shall be entitled, on payment of the requisite fee, to a copy of the account relating to his quota, certified in the manner laid down in the by-laws.

Tea for export to be covered by licence or permit.

19. *(1)* No consignment of tea or tea seed shall be shipped or waterborne to be shipped for export or shall be exported until the owner has delivered to the Customs-collector a valid export licence or special export licence in duplicate or a permit issued by or on behalf of the Central Government covering the quantity to be shipped.

(2) No consignment of tea or tea seed shall be shipped or waterborne to be shipped for carriage to any of the French or Portuguese Settlements bounded by India until the owner has delivered to the Customs-collector a permit issued by or on behalf of the Committee or issued by or on behalf of the Central Government, as the case may be, covering the quantity to be shipped.

(3) No permit for the passage of any tea by land into any of the French or Portuguese Settlements bounded by India shall be granted under sub-section *(1)* of section 5 of the Land Customs Act, 19 of 1924, unless the application for such permit is accompanied by a permit granted in this behalf by the Committee covering the quantity to be passed.

Power of Committee to call for returns.

20. *(1)* The Committee may serve by post a notice upon the owner of any tea estate or upon his manager, requiring him to furnish, within such period not being less than thirty days as it may specify in the notice, such returns relating to the production, sale and export of tea produced on the estate, or to any other matter as it may deem necessary to enable it to discharge its duties under this Chapter.

(2) Where any return required under sub-section *(1)* in respect of any tea estate is not furnished within the period specified in the notice, the Committee may refuse to allot a quota to that estate under section 14, or, where a quota has already been allotted, may cancel the unexhausted balance of that quota and refuse to issue any further export licences under section 16 against that quota or to recognize or give effect to any transfer under section 15.

Power of Committee to require evidence of ownership.

21. *(1)* The Committee may serve by post a notice upon any person claiming to be the owner of any tea estate or upon his agent or manager or upon any person claiming to be the agent or the manager of the owner of any tea estate requiring him to furnish, within such period as may be specified in the notice or within such extended period as the Committee may allow, such documentary or other evidence as may be required to prove to the satisfaction of the Committee that such person is the owner of such tea estate or is the agent or manager of the owner of a tea estate, as the case may be.

(2) Where any person fails to comply with the requirements of a notice served on him under sub-section *(1)* or where the evidence furnished by such person is insufficient to prove to the satisfaction of the Committee that such person is the owner of the tea estate of which he claims to be the owner or is the agent or manager of the owner of a tea estate, as the case may be, the Committee may refuse to issue to such person or to his agent or manager any export licences against the quota allotted to such tea estate.

Fees.

22. *(1)* The Committee may charge and collect the following fees, namely :—

(a) a licence fee for every export licence or special export licence or permit issued by it, at such rates, not exceeding one rupee per thousand pounds of tea or part thereof covered by the licence or permit, as the Central Government may, on the recommendation of the Committee by notification in the official Gazette, fix in this behalf;

(b) a fee, not to exceed eight annas per acre of the area concerned, on any application under sub-section *(3)* of section 14 for re-determination of crop basis; and

(c) copying fees for certified copies of accounts of quotas, at the rate of one rupee per copy :

Provided that the owner of any tea estate to which a quota has been allotted under section 14 may make, or the Committee may require him to make, a consolidated payment of export licence fees at the rate fixed under clause *(a)* to cover the whole of the quota.

(2) The Committee shall apply the fees collected by it under this section to the meeting of expenses incurred by it in pursuance of the purposes of this Act, and, with the previous sanction of the Central Government, to the payment of a contribution towards the maintenance of any international committee established in furtherance of the said purposes in or by tea producing countries generally.

Power to make rules.

23. The Central Government may, by notification in the official Gazette, make rules—

(a) prescribing all matters requiring to be prescribed for the purposes of the Schedule;

(b) regulating the grant of permits for the carriage of tea to the French and Portuguese Settlements;

(c) prescribing the documents referred to in sub-section *(2)* of section 15;

(d) prescribing the form of export licences and special export licences and permits; and

(e) generally to carry out the purposes of this Chapter.

Bar of jurisdiction.

24. No quota fixed, no order granting or refusing to grant any licence or permit, and no other act done by the Committee under this Chapter shall be called in question in any Court except the High Court under the provisions of sub-section *(2)* of section 7 of this Act.

Export of tea produced in Indian States.

25. Where legislation enacted in any Indian State has made provision in pursuance of the agreement implemented by and in consonance with the provisions contained in this Act for the control of the export of tea from and for the control of the extension of the cultivation of tea in the State, the Committee shall issue export licences, special export licences and permits for the export or carriage out of British India of

tea produced in any such State in the same manner and subject to the same incidents as such licences or permits are issued in respect of tea produced in British India.

CHAPTER III.

CONTROL OVER THE EXTENSION OF TEA CULTIVATION.

Method of control of extension of tea cultivation.

26. So long as this Act remains in force, no one shall plant tea in any land which was not planted with tea on the 31st day of March, 1938, save in pursuance of a written permission granted by or on behalf of the Committee :

Provided that this section shall apply to the replacing of tea areas by planting new areas, but nothing in this section shall prohibit the infilling of or supplying of vacancies on land planted with tea at the 31st day of March, 1933, or the replanting of tea upon—

(a) land planted with tea at the 31st day of March, 1933, from which the original bushes have been uprooted, or

(b) land planted with tea at the 31st day of March, 1931, from which the original bushes have been uprooted.

Limitations to the extension of tea cultivation.

27. *(1)* Subject to the provisions of section 29 and section 30, the total area of land in British India, in respect of which the permissions referred to in section 26 may be granted, shall not exceed one-half of one per cent. of the total area of the land planted with tea in British India on the 31st day of March, 1938.

(2) Subject to the provisions of section 29 and section 30, the total area of land in any Province, in respect of which such permissions may be granted, shall be determined by the Committee and shall be as near as may be one-half of one per cent. of the total area in the Province which was planted with tea on the 31st day of March, 1938.

(3) The Committee shall publish the total areas so determined for the various Provinces by notification in the official Gazette of the Central Government as soon as may be after the commencement of this Act.

(4) The Committee shall grant permission for planting new areas to the tea estates in accordance with rules to be prescribed upto a total area in each province as may be determined under sub-clause *(3)*, provided that permission shall be granted to extend an existing area planted with tea only to a tea estate of which the total existing area planted with tea does not exceed 300 acres where the estate is owned by a limited liability company, or 150 acres where it is owned by any individual proprietor or proprietors :

Provided that the Committee shall also be empowered to grant extensions for the Tocklai and Nellakotta experimental stations.

Grant of permission to plant tea.

28. *(1)* Applications for permission to plant tea on any land not planted with tea on the 31st day of March, 1938, shall be made to the Committee not later than six months from the commencement of this Act and shall contain a clear statement of all special circumstances justifying the application.

(2) Subject to the limits laid down in section 27, the Committee may grant or refuse the permission applied for or may grant it in part only, or may call for further information from the applicant.

(3) No order by the Committee under sub-section *(2)* shall be called in question by any Court.

Grant of permission to plant tea in special circumstances.

29. *(1)* Where any land which was on the 31st day of March, 1933, planted with tea—

(a) has since become wholly incapable of carrying tea through subsidence, flood, erosion, earthquake or other irresistible superhuman cause, or

(b) has since been compulsorily acquired under the provisions of the Land Acquisition Act, 1 of 1894, or of any other law for the time being in force and no longer carries tea,

the owner of the tea estate in which such land was situated may apply to the Committee for permission to plant tea on land not planted with tea.

(2) Upon such application being made and upon proof to the satisfaction of the Committee that the applicant is entitled to the benefit of sub-section *(1)*, the Committee may grant permission to plant tea on land not planted with tea :

Provided that the area of land, in respect of which such permission is granted, shall be within the area of the same tea estate

and shall not exceed in extent the area of the land incapable of carrying tea or compulsorily acquired, as the case may be.

(3) All areas of land in respect of which permission to plant tea is granted under this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

Tea nurseries.

30. *(1)* Subject to the provisions of sub-section *(4)*, the owner of a tea estate may establish nurseries on land not previously planted with tea for the growing of plants intended for infilling or supplying vacancies or for replanting land planted with tea within the area of the estate or for any other purpose approved by the Committee :

Provided that the total area utilised for nurseries in British India shall not upon the 31st day of March, 1943, exceed the area so utilised in British India on the 31st day of March, 1933.

(2) All areas of land utilised for nurseries in accordance with this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

(3) The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the area of the land utilized for nurseries as it may deem necessary.

(4) If any return required under sub-section *(3)* is not furnished to the Committee within the period specified in the notice or if in the opinion of the Committee the total area of the land utilised for nurseries is excessive, the Committee may make such restrictive or other order as it deems necessary and in particular may order the uprooting of any bushes planted on any such land.

Appeal to Provincial Government.

31. *(1)* Any applicant aggrieved by an order of the Committee under section 28, section 29 or section 30 may appeal to the Provincial Government within sixty days from the date thereof and the Provincial Government may cancel, modify or suspend any such order.

(2) The records of the Committee relating to proceedings under this Chapter shall be open to inspection at all reasonable times by any officer authorized in this behalf by the Provincial Government.

Power of the Committee to call for returns and to inspect.

32. *(1)* The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the cultivation of tea on the estate as it may deem necessary.

(2) Any member of the Committee and any officer of the Committee or person authorized by it in this behalf may at any reasonable time enter upon and inspect the lands of any tea estate and may require the owner of the estate to produce for inspection any records of the estate in his control or custody relating to the cultivation of tea on the estate.

(3) Where any return required under sub-section *(1)* in respect of any tea estate is not furnished to the Committee within the period specified in the notice, the Committee may refuse to grant any permission under section 28 to plant tea on that estate.

CHAPTER IV.

PENALTIES AND PROCEDURE.

Penalty for illicit export.

33. A breach of the provisions of sub-section *(1)* or sub-section *(2)* of section 19 shall be punishable as if it were an offence under Item No. 8 of section 167 of the Sea Customs Act, 8 of 1878, and the provisions of section 168 and of Chapter XVII of that Act shall apply accordingly.

Penalty for making false return.

34. Any owner of a tea estate, or his agent or manager who has furnished any return under sub-section *(1)* of section 20, or under sub-section *(3)* of section 30, or under sub-section *(1)* of section 32, containing any particular which is false and which he knew to be false or did not believe to be true, shall be punishable with fine which may extend to one thousand rupees.

Penalty for obstructing inspection of tea estate.

35. Whoever obstructs any member or officer of the Committee or any person authorized by the Committee, while such member, officer or person is entering upon or inspect-

ing the lands of any tea estate under sub-section *(2)* of section 32, and whoever. having control over or custody of any records of a tea estate relating to the cultivation of tea on that estate, refuses or fails to produce such records when required by a member or officer of the Committee or by a person authorized by the Committee under that sub-section, shall be punishable with fine which may extend to one thousand rupees.

Penalty for illicit cultivation.

36. *(1)* Whoever knowingly plants tea or causes tea to be planted in any land in contravention of section 26 shall be punishable with fine which may extend to one thousand rupees for the first offence, and with fine which may extend to five thousand rupees for any subsequent offence.

(2) Whoever uses any land in contravention of any order made by the Committee under section 30, or fails to comply with any order made by the Committee under sub-section *(4)* of section 30, shall be punishable with fine which may extend to one thousand rupees.

Removal of tea planted without permission.

37. Where any person has been convicted of any offence under section 36, the convicting Court may direct that the tea in respect of which the offence was committed shall be removed from the land within a specified time, and in the event of the order not being duly complied with, may cause the tea to be removed and may recover the cost from the person convicted as if it were arrears of land revenue due on the tea estate on which the offence was committed.

Trial of offences under sections 34, 35 and 36.

38. *(1)* No Magistrate other than a Magistrate of the first class shall take cognizance of an offence under section 34, section 35 or section 36, and such Magistrate may take cognizance of an offence only upon complaint made by a person authorized by the Committee and with the previous sanction of the Central Government, where the offence is that of furnishing a false return under sub-section *(1)* of section 20, and of the Provincial Government in any other case.

(2) The Committee shall be responsible for the conduct of all prosecutions of offences under section 34, section 35 and section 36.

CHAPTER V.

SAVINGS.

Savings.

39. Notwithstanding the expiry of the Indian Tea Control Act, 24 of 1933, and notwithstanding the provisions of sub-section *(2)* of section 9 of that Act,—

(a) the unexpended balance of fees received by the Indian Tea Licensing Committee constituted under that Act shall not lapse to Government but shall be transferred to the Indian Tea Licensing Committee as constituted under section 3 of this Act.

(b) until provision is otherwise made under the corresponding provisions of this Act, all fees fixed, all licenses and permits issued and all quotas allotted under the Indian Tea Control Act, 24 of 1933, shall, unless inconsistent with the provisions of this Act, be deemed to have been fixed, issued or allotted under this Act ; and

(c) any offence punishable under the Indian Tea Control Act, 24 of 1933, shall be punishable and may be dealt with as if it were an offence punishable under the corresponding provision of this Act,

and anything done before the 31st day of March, 1938, by the Indian Tea Licensing Committee constituted under the Indian Tea Control Act, 24 of 1933, with a view to the allotment to tea estates of export quotas under and in accordance with this Act, shall, so long as it is not inconsistent with any of the provisions of this Act, be as valid as if it had been done after this Act came into force.

THE SCHEDULE.

(*See* section 14.)

Crop Basis mentioned in section 14 *(2)* of the Act will include the following :

(1) The Crop Basis of a tea estate for each financial year shall on and from the 1st April 1938, be the crop basis which was ascertained for such tea estate for the financial year 1937-38, or the highest figure fixed for any year after investigation by the Committee, whichever be higher, in accordance with the rules under the Indian Tea Control Act, 1933, with the addition of allowances for special hardship determined under rules 4 and 5 framed under section 23 of the Indian Tea Control Act, 1933.

(2) Allowances for Young areas, i. e., tea planted from 1st January 1926, onwards

to be added automatically in accordance with scales that may be fixed for different localities in the prescribed manner.

(3) Allowances for low producing areas as may be determined in the prescribed manner.

ACT NO. IX OF 1938

Workmen's Compensation (Amendment) Act, 1938.

[Recd. G. G.'s assent on 5th April 1938.]

An Act further to amend the Workmen's Compensation Act, 1923, for certain purposes.

WHEREAS it is expedient further to amend the Workmen's Compensation Act. 8 of 1923, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Workmen's Compensation (Amendment) Act, 1938.

Amendment of section 2, Act 8 of 1923.

2. In clause *(d)* of sub-section *(1)* of section 2 of the Workmen's Compensation Act, 8 of 1923 (hereinafter referred to as the said Act),—

(a) in sub-clause *(i)*, for the word "wife" the word "widow" shall be substituted;

(b) in sub-clause *(ii)* for the word "husband" the word "widower" shall be substituted; and

(c) in sub-clause *(ii)*, after the words "a minor child of a deceased son," the words and comma "a minor child of a deceased daughter where no parent of the child is alive," shall be inserted.

Amendment of section 3, Act 8 of 1923.

3. In sub-section *(2)* of section 3 of the said Act,—

(a) for the words beginning "If a workman" and ending "disease of anthrax" the following words shall be substituted, namely:—

"If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment";

(b) after the words "any employment specified in" the words "Part B of" shall be inserted; and

(c) at the end of the *Explanation* the words "in the same kind of employment" shall be added.

Amendment of section 5, Act 8 of 1923.

4. In section 5 of the said Act, the brackets and figure "*(1)*" shall be omitted, and in the *Explanation* for the word "sub-section" the word "section" shall be substituted.

Amendment of section 10, Act 8 of 1923.

5. In section 10 of the said Act,—

(a) in sub-section *(1)*—

(1) for the words beginning "No proceedings for the recovery of compensation" and ending "within six months from the date of death" the following shall be substituted, namely:—

"No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within one year of the occurrence of the accident or, in case of death, within one year from the date of death";

(2) in the second proviso—

(i) for the words "maintenance of proceedings" the words "entertainment of a claim" shall be substituted;

(ii) in clause *(a)*, for the word "made" the word "preferred" shall be substituted; and

(iii) in clause *(b)*, after the word "employer" the words "or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed" shall be inserted;

and

(3) in the third proviso, for the word "admit" the word "entertain" shall be substituted and for the words "instituted" and "institute" respectively the words "preferred" and "prefer" shall be substituted;

and

(b) in sub-section *(2)* the word "directly" shall be omitted.

Notes.—Sub-section *(1)* was redrafted as the word "instituted" used in the old section was interpreted by the Calcutta High Court in A I R 1934 Cal 460 to mean instituted before the employer. The new sub section makes it clear that the claim refers to claims instituted before the Commissioner. In sub-section *(1)*, clause *(b)* the second Proviso as it stood covered only cases where the employer himself had knowledge of the accident ; the amendment includes cases of other persons like manager or other person competent to receive notice being aware of accident.

Amendment of section 11, Act 8 of 1923.

6. In sub-section *(6)* of section 11 of the said Act,—

(a) for the words "if it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonable" the following shall be substituted, namely :—

"if it is proved that the workman has not thereafter been regularly attended by a qualified medical practitioner or having been so attended has deliberately failed to follow his instructions and that such refusal, disregard or failure was unreasonable"; and

(b) after the words "qualified medical practitioner", where they occur for the last time, the words "whose instructions he had followed" shall be inserted.

Amendment of section 15, Act VIII of 1923.

7. Sub-section *(4)* of section 15 of the said Act shall be omitted and sub-section *(5)* of that section shall be re-numbered as sub-section *(4)*.

Amendment of section 18, Act VIII of 1923.

8. In section 18 of the said Act, for the words and figures "a certificate granted in respect of such person under section 7 or section 8 of the Indian Factories Act, 1911" the words and figures "a valid certificate granted in respect of such person under section 12 or section 52 of the Factories Act, 1934" shall be substituted.

Notes.—This change is consequent to the enactment of Factories Act, 1934.

Amendment of section 21, Act VIII of 1923.

9. In sub-section *(2)* of section 21 of the said Act,—

(a) for the words "by any party to any proceedings pending before him that such matter" the words "that any matter arising out of any proceedings pending before him" shall be substituted and ;

(b) before the proviso the following proviso shall be inserted, namely :—

"Provided that the Commissioner shall not where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard :",

and in the existing proviso, after the word "Provided" the word "further" shall be inserted.

Amendment of section 24, Act VIII of 1923.

10. In section 24 of the said Act, for the words "other person authorised in writing by such person" the following shall be substituted, namely :—

"by an official of an Insurance Company or registered Trade Union authorized in writing by such person or, with the permission of the Commissioner, by any other person so authorized."

Amendment of Schedule II, Act VIII of 1923.

11. In Schedule II to the said Act,—

(a) in clause *(i)*, for the words "mechanically propelled vehicles" the words "a lift or a vehicle propelled by steam or other mechanical power or by electricity" shall be substituted ;

(b) in clause *(ii)*, for the words, brackets and figures "clause *(4)* of section 2 of the Indian Factories Act, 1911" the words, brackets, letter and figures "clause *(g)* of section 2 of the Factories Act, 1934" shall be substituted ;

(c) after clause *(xxii)* the following clauses shall be inserted, namely :—

"*(xxiii)* employed in the tapping of palm-trees or the felling or logging of trees, or the transport of timber by inland waters, or the control or extinguishing of forest fires ; or

(xxiv) employed in operations for the catching or hunting of elephants or other wild animals ; or"

and

(d) the existing clause *(xxiii)* shall be re-numbered as clause *(xxv)* and after that clause as so re-numbered the following word and clauses shall be inserted, namely :—

"or

(xxvi) employed in the handling or transport of goods in, or within the precincts of,—

(a) any warehouse or other place in which goods are stored, and in which on any one day of the preceding twelve months ten or more persons have been so employed, or

(b) any market in which on any one day of the preceding twelve months one hundred or more persons have been so employed; or

(xxvii) employed in any occupation involving the handling and manipulation of radium or X-rays apparatus, or contact with radioactive substances".

Amendment of Schedule III, Act VIII of 1923.

12. In Schedule III to the said Act,—

(a) before the entry relating to lead poisoning or its sequelæ the following shall be inserted, namely :—

"PART A.

Anthrax. . .	Any employment— *(a)* involving the handling of wool, hair, bristles or animal carcases or parts of such carcases, including hides, hoofs and horns ; or *(b)* in connexion with animals infected with anthrax; or *(c)* involving the loading, unloading or transport of any merchandise.
Compressed air illness or its sequelæ.	Any process carried on in compressed air.
Poisoning by lead tetra-ethyl.	Any process involving the use of lead tetra-ethyl.
Poisoning by nitrous fumes.	Any process involving exposure to nitrous fumes.

PART B.";

(b) in the entry relating to lead poisoning or its sequelæ, to the words in the first column the words "excluding poisoning by lead tetra-ethyl" shall be added, and for the words "or its preparations or compounds" in the second column the words "or any of its preparations or compounds except lead tetra-ethyl" shall be substituted ; and

(c) for the existing entry relating to compressed air illness or its sequelæ the following entries shall be substituted, namely :

"Arsenical poisoning or its sequelae.	Any process involving the production, liberation or utilisation of arsenic or its compounds.
Pathological manifestations due to— *(a)* radium and other radio-active substances ; *(b)* X-rays.	Any process involving exposure to the action of radium, radioactive substances or X-rays.
Primary epithelliomatous cancer of the skin.	Any process involving the handling or use of tar, pitch, bitumen, mineral oil, paraffin, or the compounds, products or residues of these substances".

ACT NO. X OF 1938.

Cutchi Memons Act, 1938.

[Recd. G. G.'s assent on 8th April 1938.]

An Act to provide that all Cutchi Memons shall be governed in matters of succession and inheritance by the Mahomedan law.

WHEREAS it is expedient that all Cutchi Memons be governed in matters of succession and inheritance by the Mahomedan law : It is hereby enacted as follows :—

Short title and commencement

1. *(1)* This Act may be called the Cutchi Memons Act, 1938.

(2) It shall come into force on the 1st day of November 1938.

Cutchi Memons to be governed in certain matters by Mahomedan law.

2. Subject to the provisions of section 3, all Cutchi Memons shall, in matters of succession and inheritance be governed by the Mahomedan law.

Notes — Even after the passing of Act of 1920, there still remained some Cutchi Memons who persisted in being governed by Customary law. In order to bring uniformity, the entire Cutchi Memon community should be governed by Mahomedan law and this is effected by this Act.

Savings.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

Repeal.

4. The Cutchi Memons Act, 46 of 1920, is hereby repealed.

ACT No. XI OF 1938.

Hindu Women's Rights to Property (Amendment) Act, 1938.

[Recd. G. G.'s assent on 8th April 1938.]

An Act to amend the Hindu Women's Rights to Property Act, 1937.

WHEREAS it is expedient to amend the Hindu Women's Rights to Property Act, 18 of 1937, for the purposes hereinafter appearing ; It is hereby enacted as follows:

Short title and effect.

1. (*1*) this Act may be called the Hindu Women's Rights to Property (Amendment) Act, 1938.

(*2*) It shall have retrospective effect as if it had come into force on the 14th day of April 1937.

Amendment of section 2, Act 18 of 1937.

2. In section 2 of the Hindu Women's Rights to Property Act, 1937, (hereinafter referred to as the said Act), the words "leaving a widow" shall be omitted.

Notes—Under S. 2, as it stood before, if a Hindu died a widower, the right of inheritance conferred on his widowed daughter-in-law by the provisos to S. 3 could not take effect. Her right was not intended by the Legislature to depend on the survival of her widowed mother-in-law. The words "leaving a widow" are omitted to make the intention clear.

Amendment of section 3, Act 18 of 1937.

3. In section 3 of the said Act :—

(*a*) In sub-section (*1*), for the paragraph preceding the first proviso, the following shall be substituted, namely :—

"*3.* (*1*) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by Customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (*3*), be entitled in respect of property in respect of which he dies intestate to the same share as a son."

(*b*) in sub-section (*2*) the word "intestate" shall be omitted ; and

(*c*) in sub-section (*4*), after the words "rule of succession" the words "or by the terms of the grant applicable thereto" shall be inserted.

Notes—The word 'intestate' in S. 3 (2) has been omitted as it was likely to give rise to difficulties.

Insertion of new section 5 in Act 18 of 1937.

4. After section 4 of the said Act the following section shall be inserted, namely :—

Meaning of expression "die intestate."

"5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

ACT No. XII OF 1938.

The Durgah Khawaja Saheb (Amendment) Act, 1938

(Recd. G. G.'s assent on 8th April 1938.)

An Act to amend the Durgah Khawaja Saheb Act, 1936.

WHEREAS it is expedient to amend the Durgah Khawaja Saheb Act, 23 of 1936, for the purposes hereinafter appearing; It is hereby enacted as follows :

Short title.

1. This Act may be called the Durgah Khawaja Saheb (Amendment) Act, 1938.

Amendment of section 2, Act 23 of 1936.

2. In sub-clause *(d)* of Clause *(4)* of section 2 of the Durgah Khawaja Saheb Act, 23 of 1936 (hereinafter referred to as the said Act), the words "in India" shall be omitted.

Amendment of section 5, Act 23 of 1936.

3. For section 5 of the said Act the following section shall be substituted namely :

Composition of Committee.

"5. *(1)* The Committee shall consist of 25 members, who shall be Hanafi Muslims, namely :

(a) the Sajjadanashin for the time being, *ex-officio*, or his nominee;

(b) the Mutawalli for the time being, *ex-officio*, or his nominee;

(c) two elected from among their own number by members of the Khadim community who are recorded as voters in the register of voters for the Ajmer Municipal Committee ;

(d) five elected from among their own number by Muslims (other than members of the Khadim community) who are recorded as voters in the register of voters for the Ajmer Municipal Committee;

(e) eleven, not being persons residing within the limits of the Ajmer Municipality, elected in the following manner, namely :

(i) three by the Muslim members of the Central Legislature;

(ii) one by the Muslim members of the Provincial Legislature of Madras;

(iii) one by the Muslim members of the Provincial Legislature of Bombay;

(iv) one by the Muslim members of the Provincial Legislature of Bengal;

(v) one by the Muslim members of the Provincial Legislature of the United Provinces;

(vi) one by the Muslim members of the Legislative Assembly of the Punjab;

(vii) one by the Muslim members of the Provincial Legislature of Bihar;

(viii) one by the Muslim members of the Legislative Assembly of the North-West Frontier Province; and

(ix) one by the Muslim members of the Legislative Assembly of Sind;

(f) one nominated by His Exalted Highness the Nizam of Hyderabad and Berar; and

(g) four Sajjadanashins of the shrines of the Shishti order of Sufis co-opted by the members of the Committee referred to in clauses *(a)* to *(f)*.

(2) No person shall be qualified to be a member of the Committee if :

(a) he cannot read and write Urdu; or

(b) he has been convicted by a Criminal Court of any offence involving moral turpitude, and sentenced to imprisonment for a period exceeding three months :

Provided that the Central Government may, by special order, declare that any person disqualified under this clause shall cease to be so disqualified.

(3) Ne person shall be disqualified for election to the Committee under clause *(e)* of sub-section *(1)* by reason only of the fact that he is not a member of the Legislature or Legislative Assembly concerned.

(4) If any authority or body entitled to elect, nominate or co-opt a member fails to do so within six months, the Central Government may nominate a member to fill the vacancy from among persons qualified to be elected, nominated or co-opted in respect of the vacancy."

Repeal of sections 6, 7 and 8, Act 23 of 1936.

4. Sections 6, 7 and 8 of the said Act shall be omitted.

Amendment of section 9, Act 23 of 1936.

5. For section 9 of the said Act the following section shall be substituted, namely :

Term of office of members and casual vacancies.

"9. *(1)* Members of the Committee, other than those referred to in clauses *(a)* and *(b)* of sub-section *(1)* of section 5, shall hold office for five years from the date of their election, nomination or co-option; and casual vacancies among such members shall be filled by election, nomination or co-option, as the case may be, by the authority which elected, nominated or co-opted the member whose place is to be filled.

(2) The term of office of a member elected, nominated or co-opted to fill a casual vacancy shall continue for so long only as the member whose place has been filled would have been entitled to hold office if the vacancy had not occurred."

Amendment of section 10, Act 23 of 1936.

6. In sub-section *(1)* of section 10 of the said Act, for the words, letters, brackets and figure "except those who are elected under items *(a)*, *(b)* and *(c)* of section 5" the following shall be substituted, namely :

"other than those referred to in clauses *(a)* to *(c)* of sub-section *(1)* of section 5."

Amendment of section 11, Act 23 of 1936.

7. For sub-section *(3)* of section 11 of the said Act the following sub-section shall be substituted, namely :

"*(3)* The Committee shall exercise its powers of administration, control and management of the Durgah Endowment through the Mutawalli, who shall be the Manager of the Durgah endowment."

Amendment of section 12, Act 23 of 1936.

8. In section 12 of the said Act :

(a) after the words "such duties as may" the words "subject to such conditions, if any, as the Committee may impose," shall be inserted; and

(b) the words "subject to the confirmation by the Committee" shall be omitted.

Amendment of section 14, Act 23 of 1936.

9. For section 14 of the said Act the following section shall be substituted, namely :—

Rules.

"14. In the case of elections under clause *(c)* or clause *(d)* of sub-section *(1)* of section 5, the Chief Commissioner, and, in the case of elections under clause *(e)* of the said sub-section, the Presidents of both Chambers of the Legislature concerned, acting together, or the President of the Legislative Assembly concerned, as the case may be, may make rules to provide for—

(i) the procedure for such elections , and

(ii) the decision of election disputes."

Amendment of section 16, Act 23 of 1936.

10. For section 16 of the said Act the following section shall be substituted, namely :—

Board of Arbitration.

"16. *(1)* Any dispute arising between the Committee on the one part and the Sajjadanashin, the Mutawalli and any Khadim, or any of them, on the other part, relating to the privileges of the Sajjadanashin, the Mutawalli or such Khadim, shall, at the request of either party to the dispute, be referred to a Board of Arbitration consisting of—

(i) a nominee of the Committee ;

(ii) a nominee of the other party to the dispute ; and

(iii) a person who holds or has held the office of, or is acting or has acted as, a District Judge, to be appointed by the Chief Commissioner,

and the decision of the Board shall be final and shall not be questioned in any Court.

(2) No suit shall lie in any Court in respect of any matter which is required by sub-section *(1)* to be referred to a Board of Arbitration."

Notes:—The new section explains what classes of disputes are intended to be covered by the section.

Amendment of section 18, Act 23 of 1936.

11. In section 18 of the said Act, for the words "The Durgha Committee shall not be empowered to use the property, movable and immovable" the words "The Committee shall not use the property, movable or immovable" shall be substituted.

Amendment of section 19, Act 23 of 1936.

12. In section 19 of the said Act, before the words "Durgha Endowment", where they occur the second time, the word "the" shall be inserted.

Amendment of section 20, Act 23 of 1936.

13. For section 20 of the said Act the following section shall be substituted, namely:—

Audit of accounts and annual report.

"20. *(1)* The accounts of the Durgah shall be audited every year by an auditor holding a certificate granted under sub-section *(1)* of section 144 of the Indian Companies Act, 7 of 1913.

(2) The Committee shall every year prepare a report on the administration of the Durgah, which together with the accounts of the Durgah and the report of the auditor thereon, shall be published in the Gazette of India."

ACT NO. XIII OF 1938.

Sind Salt Law Amendment Act, 1938.

[Received G. G.'s assent on 8th April 1938.]

An Act to amend the law relating to salt as at present in force in Sind.

WHEREAS, by the Government of India Act, 1935, salt has been classified as a matter to which the executive authority of the Central Government extends, and it is, therefore, expedient to amend certain enactments in force in the Province of Sind relating to salt so as to vest in the Central Government powers of control in respect of that matter ; It is hereby enacted as follows :—

Notes:—This Act makes the adjustments necessary to bring the Transport of Salt Act, 1879, and Bombay Salt Act, 1890, as till now in force in Sind, into accord with the provisions of the Government of India Act by removing certain anomalies in the Sind versions of these Acts.

Short title.

1. This Act may be called the Sind Salt Law Amendment Act, 1938.

Amendment of certain enactments.

2. With effect on the 1st day of April, 1938, the Transport of Salt Act, 16 of 1879, as in force in Sind, and the Bombay Salt Act, 2 of 1890, as in force

in Sind, are hereby amended to the extent and in the manner stated in the Schedule.

Saving of rules, etc., made by previous authorities.

3. Any appointment, notification, rule, order, exemption, licence, pass, permit or power in force before the commencement of this Act and made, issued or conferred by an authority, for the making, issuing or conferring of which a new authority is substituted by or under this Act, shall, unless inconsistent with this Act, be deemed to have been made, issued or conferred by such new authority unless and until cancelled or withdrawn or superseded by an appointment, notification, rule or order made or issued by such new authority.

THE SCHEDULE.

(*See* section 2)

PART I.—*The Transport of Salt Act, 1879 (XVI of 1879), as in force in Sind.*

In sections 3 and 6, for the words "Provincial Government of Sind", wherever they occur, the words "Central Government" shall be substituted.

PART II.—*The Bombay Salt Act, 1890 (Bombay Act II of 1890), as in force in Sind.*

1. In sub-section *(1)* of section 4, for the words "Subject to such control of the Central Government, as may be prescribed by rules made under section 45-A of the Government of India Act, the Provincial Government of Sind" the words "The Central Government" shall be substituted.

2. In sub-sections *(2)*, *(3)* and *(5)* of section 4, and in sections 5, 10, 14, 17, 24, 36, 37, 52, 58 and 59, for the words "Provincial Government of Sind", wherever they occur, the words "Central Government" shall be substituted.

3. In section 25, for the words "Provincial Government of Sind" the words "Central Government" shall be substituted, and for the words "it may proceed" the words "the Provincial Government shall at the request of the Central Government proceed" shall be substituted.

4. Clause *(a)* of section 36 shall be omitted.

5. In section 60, the words "and in Sind in the Official Gazette," shall be omitted.

ACT NO. XIV OF 1938.

The Sugar Industry Protection (Temporary Extension) Act, 1938.

[Recd. G. G.'s assent on 8th April 1938.]

An Act to provide for the temporary continuance of the existing protection conferred on the sugar industry in British India.

WHEREAS it is expedient to provide for the continuance for a period of one year of the existing protection conferred on the sugar industry in British India and to extend the date before which the Central Government is required under section 3 of the Sugar Industry (Protection) Act, 13 of 1932, to lay before the Indian Legislature the proposals referred to in the said section; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Sugar Industry Protection (Temporary Extension) Act, 1938.

Amendment of section 3, Act 13 of 1932.

2. In section 3 of the Sugar Industry (Protection) Act, 13 of 1932, for the figures "1938", where they occur for the second time, the figures "1939" shall be substituted.

Amendment of First Schedule, Act 32 of 1934.

3. In the First Schedule to the Indian Tariff Act 32 of 1934, for Item No. 17 the following shall be substituted, namely:—

"17	Sugar excluding confectionery.	Protective	The rate at which excise duty is for the time being leviable on sugar, other than *khandsari* or palmyra sugar, produced in British India *plus* Rs. 7-4-0 per cwt.	March 31st 1939."

ACT NO. XV OF 1938.

The Indian Coffee Cess (Amendment) Act, 1938.

[Recd. G. G.'s assent on 8th April 1938.]

An Act to amend the Indian Coffee Cess Act, 1935, for a certain purpose.

WHEREAS it is expedient to amend the Indian Coffee Cess Act 14 of 1935, for the purpose hereinafter appearing; It is hereby enacted as follows:—

1. *(1)* This Act may be called the Indian Coffee Cess (Amendment) Act, 1938. *Short title and commencement.*

(2) It shall come into force on such date as the Central Government by notification in the official Gazette may appoint.

2. In clause (ii) of sub-section (1) of section 4 of the Indian Coffee Cess Act 14 of 1935,— *Amendment of section 4, Act 14 of 1935.*

(a) in sub-clause (c) the word "and' shall be omitted; and

(b) for sub-clause (d) the following sub-clauses shall be substituted, namely:—

"*(d)* one person nominated by the Coorg Planters' Association;

(e) one person nominated by the Mysore Planters' Association; and

(f) one person nominated by the Indian Planters' Association, Mysore;".

ACT NO. XVI OF 1938.

Indian Tariff (Amendment) Act, 1938.

[Received G. G.'s assent on 9th April 1938.]

An Act further to amend the Indian Tariff Act, 1934, for a certain purpose.

WHEREAS it is expedient further to amend the Indian Tariff Act, 32 of 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

1. This Act may be called the Indian Tariff (Amendment) Act, 1938. *Short title.*

2. In the First Schedule to the Indian Tariff Act, 32 of 1934, for Item No. 10 (2) the following item shall be substituted, namely:— *Amendment of First Schedule, Act 32 of 1934.*

"10(2)	BROKEN RICE	Protective	Twelve annas per Indian Maund of 82 2/7 lbs. avoirdupois weight.	. .	March 31st, 1939."

Notes:—The same rate of 12 annas is continued for another year till 31st March 1939.

ACT NO. XVII OF 1938.

Trade Disputes (Amendment) Act, 1938.

[Received G. G.'s assent on 9th April 1938.]

An Act further to amend the Trade Disputes Act, 1929, for certain purposes.

WHEREAS is is expedient further to amend the Trade Disputes Act, 7 of 1929, for the purposes hereinafter appearing; It is hereby enacted as follows:—

1. This Act may be called the Trade Disputes (Amendment) Act, 1938. *Short title.*

2. In section 2 of the Trade Disputes Act, 7 of 1929 (hereinafter referred to as the said Act),— *Amendment of section 2 Act 7 of 1929.*

(a) in clause *(g)*,—

(i) after sub-clause *(i)* the following sub-clause shall be inserted, namely:—

"*(ia)* any water transport service carrying passengers to whose vessels any of the provisions of the Inland Steam-vessels Act, 1917, apply or tramway service, if the Provincial Government by notification in the official Gazette, declares the water transport or tramway service, as the case

may be, to be a public utility service for the purposes of this Act, or"; and

(ii) in sub-clause *(iii)*, after the word "supplies" the word "power" shall be inserted;

(b) in clause *(j)*, after the word "difference" the words "between employers and employers or" shall be inserted; and

(c) in clause *(k)*, after the word "reward" the following words shall be inserted, namely :—

"and includes for the purposes of any proceedings under this Act in relation to a trade dispute a workman discharged during that dispute".

Amendment of section 3, Act 7 of 1929.

3. In section 3 of the said Act,—

(a) the words "between an employer and any of his workmen" shall be omitted; and

(b) for the words "the employer" the words "an employer concerned" shall be substituted.

Amendment of section 4, Act 7 of 1929.

4. For sub-section *(2)* of section 4 of the said Act the following sub-section shall be substituted, namely :—

"*(2)* A Court, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number :

Provided that if the appointing authority notifies the Court that the services of the chairman have ceased to be available the Court shall not act until a new chairman has been appointed."

Amendment of section 6, Act 7 of 1929.

5. For sub-section *(3)* of section 6 of the said Act the following sub-section shall be substituted, namely :—

"*(3)* A Board, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number :

Provided that if the appointing authority notifies the Board that the services of the chairman or where the Board includes an equal number of persons representing the parties to the dispute the services of any such person have ceased to be available the Board shall not act until a new chairman or member, as the case may be, has been appointed."

Amendment of section 10, Act 7 of 1929.

6. To section 10 of the said Act the following sub-section shall be added namely:—

"*(3)* Where a Board includes an equal number of persons representing the parties to the dispute, and the services of any such person have ceased to be available as aforesaid, the appointing authority shall appoint in the manner specified in sub-section *(2)* of section 6 another person to take his place, and the proceedings shall be continued before the Board so reconstituted."

Amendment of section 15, Act 7 of 1929.

7. In section 15 of the said Act,—

(a) in sub-section *(2)*,—

(i) for the words "his workmen" the words "any of his workmen" shall be substituted;

(ii) for the words "liable to" the words "punishable with" shall be substituted; and

(iii) for the words "to a fine" the words "with fine" shall be substituted;

(b) after sub-section *(2)* the following sub-section shall be inserted, namely :—

"*(2-A)* If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section *(1)* or gives to any person employed by him any such notices as are referred to in sub-section *(2)*, he shall within five days report to the Provincial Government or such authority as the Provincial Government may prescribe the number of such notices received or given on that day, and, if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees"; and

(c) in sub-section *(3)*, for the words, brackets and figure "under sub-section *(2)*" the words, brackets and figures "under sub-section *(2)* or sub-section *(2A)*" shall be substituted.

Amendment of section 16, Act 7 of 1929.

8. In sub-section *(1)* of section 16 of the said Act,—

(a) after the words "other than" the words "or in addition to" shall be inserted;

(b) in clause *(b)* for the words "general and prolonged" the words "and general" shall be substituted.

9. In sub-section *(1)* of section 17 of the said Act, for the word "declares" the words "commences, continues," shall be substituted.

Amendment of section 17, Act 7 of 1929.

10. After section 18 of the said Act the following heading and section shall be inserted, namely :—

Insertion of new heading and section 18A in Act 7 of 1929.

"*Conciliation Officers.*

18A. *(1)* The Central Government, in respect of industries, businesses and undertakings carried on by them or under their authority or by a railway company, and the Provincial Government, in respect of other businesses, industries or undertakings within their Province, may, by notification in the official Gazette, appoint officers, herein referred to as conciliation officers, charged with the duty of mediating in or promoting the settlement of trade disputes.

Appointment of conciliation officers.

(2) A conciliation officer may be appointed for a specified area or for specified businesses, industries or undertakings in a specified area or for one or more specified businesses, industries or undertakings and either permanently or for a limited period.

(3) A conciliation officer may, for the purposes of inquiring into an existing or apprehended trade dispute after giving reasonable notice, enter the premises occupied by any industry, business or undertaking and may call for and inspect any document which he has ground for considering to be relevant to the trade dispute, and for the purposes of any such inquiry shall be deemed to be a public servant within the meaning of the Indian Penal Code, 45 of 1860.

(4) If any person supplying information or producing a document to a conciliation officer requests in writing that the information or the document or any part thereof shall be treated as confidential the conciliation officer shall not disclose such information or the contents of such document or part thereof except to—

(a) the authority which appointed him to be a conciliation officer ; or

(b) the parties concerned in the dispute for the purpose of mediating therein or promoting the settlement thereof.

(5) If the conciliation officer contravenes the provisions of sub-section *(4)*, he shall be punishable with fine which may extend to one hundred rupees.

(6) No Criminal Court shall take cognizance of an offence under this section except with the previous sanction of the authority appointing the conciliation officer ; and no Civil Court shall without the like sanction entertain any suit against a conciliation officer in respect of the disclosure of any information or the contents of any document or part thereof of the nature referred to in sub-section *(4)*."

ACT NO. XVIII OF 1938.

The Delhi Joint Water Board (Amendment) Act, 1938.

[Recd. G. G.'s assent on 9th April 1938.]

An Act further to amend the Delhi Joint Water Board Act, 1926.

WHEREAS it is expedient to provide for the maintenance of the works established to dispose of sewage in bulk for the urban area of the City of Delhi and te improve the provisions relating to the supply of drinking water in bulk and for that purpose further to amend the Delhi Joint Water Board Act, 23 of 1926 ; It is hereby enacted as follows :—

1. *(1)* This Act may be called the Delhi Joint Water Board (Amendment) Act, 1938.

Short title and commencement.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of long title and preamble, Act 23 of 1926.

2. In the long title and preamble of the Delhi Joint Water Board Act, 23 of 1926 (hereinafter referred to as the said Act),—

(a) after the words "to supply drinking water" the words "and to dispose of sewage" shall be inserted, and

(b) for the words "a Joint Water Board" the words "a Joint Water and Sewage Board" shall be substituted.

Amendment of section 1, Act 23 of 1926.

3. In sub-section *(1)* of section 1 of the said Act, for the words "Delhi Joint Water Board Act" the words "Delhi Joint Water and Sewage Board Act" shall be substituted.

Amendment of section 2, Act 23 of 1926.

4. In section 2 of the said Act,—

(a) in clause *(a)*, for the words "Delhi Joint Water Board" the words "Delhi Joint Water and Sewage Board" shall be substituted, and

(b) in clause *(c)*,—

(i) in sub-clause (iii), for the words and brackets "Delhi (New) Cantonments" the words "Delhi Cantonment" shall be substituted, and

(ii) for sub-clause (iv) the following sub-clause shall be substituted, namely :—

"(iv) the New Delhi Municipal Committee".

Amendment of section 3, Act 23 of 1926.

5. In sub-section *(1)* of section 3 of the said Act, for the words "Joint Water Board" the words "Joint Water and Sewage Board" shall be substituted.

Amendment of section 4, Act 23 of 1926.

6. In sub-section *(1)* of section 4 of the said Act, for the words "Delhi Joint Water Board" the words "Delhi Joint Water and Sewage Board" shall be substituted.

Amendment of section 5, Act 23 of 1926.

7. In section 5 of the said Act,—

(a) after the word and letter "Parts A" the letters, "AA" shall be inserted; and

(b) after the words "the Delhi Municipal Committee" the words "the New Delhi Municipal Committee" shall be inserted.

Amendment of section 6, Act 23 of 1926.

8. In section 6 of the said Act,—

(a) after the words "for the purpose of the efficient supply of water" the words "or for the purpose of the efficient disposal of sewage" shall be inserted; and

(b) after the words "any constituent body" the words "or the public" shall be inserted.

Amendment of section 8, Act 23 of 1926.

9. In section 8 of the said Act,—

(a) in sub-section *(1)*, after the words "maintain a fund" the words "or funds" shall be inserted; and

(b) in clauses *(a)* and *(b)* of sub-section *(2)*, for the words "the fund" the words "any such fund" shall be substituted.

Amendment of section 10, Act 23 of 1926.

10. In section 10 of the said Act, for the words "specified in Part B of Schedule I", wherever they occur, the words "specified in Division I of Part B of Schedule I" and for the words "specified in that Part" the words "specified in Division I of that Part" shall be substituted, respectively.

Amendment of section 11, Act 23 of 1926.

11. After the proviso to section 11 of the said Act the following proviso shall be added, namely :

"Provided further that, if the Central Government, in consequence of the extension of the urban area of the city of Delhi, requires the Board to make additional provision for the supply of water in bulk at any place, the Board shall be bound to make such provision."

Amendment of section 13, Act 23 of 1926.

12. To section 13 of the said Act the following sub-section shall be added, namely : —

"*(5)* Nothing in this section shall preclude the Board from arranging with the consent of the constituent bodies and in accordance with any order issued by the Chief Commissioner for advance payments by the constituent bodies of the cost (calculated at the collecting rate) of such quantities of water as are likely to be supplied to the constituent bodies in each quarter or such other period as may be prescribed by the Chief Commissioner".

Insertion of new heading and new sections 14-A, 14-B and 14-C in Act 23 of 1926.

13. After section 14 of the said Act, the following heading and sections shall be inserted, namely :—

"*Disposal of sewage and payment therefor.*

Disposal of sewage.

14-A. (1) The Board shall be bound to receive in bulk from each constituent body except the Military Engineer Services, Delhi Cantonment, all sewage delivered by such body and to dispose of such sewage :

Provided that no constituent body by which sewage is delivered may execute any major work calculated to increase the normal discharge of sewage without the concurrence of the Board.

(2) Sewage received in pursuance of the provisions of sub-section *(1)* shall be the property of the Board and any income derived from the sale of effluent or sludge shall be credited to the appropriate fund of the Board.

(3) If any disagreement arises between a constituent body and the Board as to the effect of the execution of any work or the doing of any thing, the matter shall be referred to the Central Government whose decision shall be final.

Constituent bodies to pay cost of disposal of sewage.

14-B. (1) Subject to the provisions of section 15, the total net cost of the disposal of all sewage shall be paid by the constituent bodies other than the Military Engineer Services, Delhi Cantonment, each body contributing such proportion thereof as the Central Government may from time to time determine :

Provided that any proportion so determined shall not be changed until the expiry of a period of five years.

(2) In determining the total net cost of the disposal of all sewage there shall be taken into account as expenditure of the Board :—

(a) all establishment charges, including all expenditure upon repairs and maintenance not debitable to the fund established under section 8 ;

(b) repayments of principal, and payments of interest, in respect of any loan taken by the Board under section 6 ; and

(c) payments into the fund established under section 8 exclusive of any such income from interest on the balance of the fund as is under rules made by the Central Government under that section to be deemed the current revenue of the Board.

Manner of payment by constituent body of proportion of cost of disposal of sewage.

14-C. (1) The estimated net cost of the disposal of sewage increased by five per cent. shall be payable on demand by each constituent body after the close of each quarter of each financial year in accordance with the proportions fixed under sub-section *(1)* of section 14B.

(2) If the sum so paid by any constituent body in any financial year exceeds or is less than the sum payable by it on the basis of the actual cost as determined under section 14B, the payments to be made by that body in the following financial year shall be adjusted accordingly.

(3) Nothing in this section shall preclude the Board from arranging with the consent of the constituent bodies and in accordance with any orders issued by the Chief Commissioner for advance payment by the constituent bodies of such portion of the cost of the disposal of sewage as is likely to be borne by them in each quarter or such other period as may be prescribed by the Chief Commissioner."

Insertion of new heading after section 14C, Act 23 of 1926.

14. After section 14C of the said Act, as inserted by section 13 the following heading shall be inserted, namely :—

"*Settlement of disputes, and recovery of sums due from constituent bodies.*"

Amendment of section 22, Act 23 of 1926.

15. In section 22 of the said Act,—

(a) in sub-section *(1)*, after the words "or pipes" wherever they occur, the words "or sewers" shall be added ; and

(b) in the proviso to sub-section *(2)*, after the words "the supply of water" the words "or the disposal of sewage" shall be inserted.

Amendment of section 26, Act 23 of 1926.

16. In section 26 of the said Act,—

(a) in clause *(b)*, for the words "water work" the words "water or sewage work" shall be substituted ;

(b) after clause *(c)* the following clause shall be inserted, namely :

"*(cc)* unlawfully obstructs the flow of, or flushes, draws off, diverts or takes sewage from any sewage work belonging to the Board, or breaks or damages any electrical transmission line maintained by the Board, or" ;

and

(c) in clause *(d)*, for the words "water work" the words "water or sewage work" shall be substituted.

Amendment of schedule 1, Act 23 of 1926.

17. In Schedule 1 to to the said Act,—

(a) after Part A the following shall be inserted, namely :—

"PART AA.

LIST OF WORKS TAKEN OVER FROM THE NEW DELHI MUNICIPAL COMMITTEE.

The original 66" outfall sewer from Q Point to Kilokri with ventilating shafts, manholes, and nullah crossings.",

(b) in Part B—

(i) after the heading "LIST OF WORKS TAKEN OVER FROM THE GOVERNMENT" the sub-heading "DIVISION I" shall be inserted ;

(ii) in entry No. 6, for the words "*New Cantonments*" the words "*Delhi Cantonment*" shall be substituted ;

(iii) after entry No. 7 the following sub-heading and entries shall be added, namely :

"Division II.

1. *Old works at Kilokri*—

(a) The original Detritus Chamber.

(b) Pumping Station comprising boiler room, chimney, pump room, coal store, workshop, office, and store, and latrines, drains, and pipelines connected thereto.

(c) Pumping Plant comprising three boilers, three pumps, economiser, feed pumps, electric generating plant, circulating pipes, crane, two weighbridges, and other accessories. One electric pump with switchgear and rising main.

(d) Workshop Equipment comprising two Lathes, 24" drilling machine, blower shafting machine, and (partly worn out) motor shafting, bench and hand stools, forge.

(e) Switchboard and lighting equipment n and around original plant.

(f) Venturi meter.

(g) Rising main.

(h) Well, Regulators, Sedimentation Tank, Aeration Bed, and Storage Tanks for circulating water, and pipes, drains and sewers connected therewith.

(i) Residential Buildings comprising Superintendent's Bungalow and garden, 62 quarters with sanitary accommodation and 19 quarters with adjacent buildings converted from the old Railway Station Buildings.

(j) Roads, fencing, trenching area, storm drains and culverts in area being taken over. Regulators and materials of channels in Sewage Farm.

2. *Works included in the Delhi Sewerage Disposal Scheme to be completed in 1938*—

(1) *New Delhi to Kilokri*—

(a) Storm Overflow at Point "Q" with control penstock.

(b) 66" dia. Out-fall Sewer from Point "Q" to Kilokri.

(2) *At Kilokri*—

(a) Penstock Chamber and 66" penstocks.

(b) Detritus and screening plant with all ancillary works.

(c) New Pumping Station Building which also contains workshop, office and store rooms and suction pumps connecting with existing work.

(d) Pumping Plant comprising—

(i) Three electric pumping units of 12 m.g.d. capacity.

(ii) Two electrically operated exhausters.

(iii) Two electrically operated bilge pumps.

(iv) Two electrically operated gland sealing pumps.

(v) Necessary penstocks valves, suction and delivery piping for items (i) to (iv).

(e) Overhead travelling crane.

(f) Low tension switchgear.

(g) Two transformers.

(h) High tension switchgear.

(i) Two overhead travelling cranes in workshop.

(j) Workshop equipment.

(k) Electric lighting and fans for building.

(l) One 44" Venturi meter and recorder.

(m) Roads and pathways.

(n) Rising main 44″ dia. 800′ long with control valves and outlet chamber.

(3) *From Kilokri to Disposal Works*—

Gravity Duct in masonry, approximately 16,500′ long.

(4) *At Disposal Works*—

(a) Bio-aeration plant consisting of 12 preliminary settling tanks, 108 aeration pockets and 48 final settling tanks, the whole with necessary valves, piping, motors, shafting and other operating gear.

(b) Sludge Pump House and four electrically operated sludge pumps and accessories.

(c) Two portable electrically operated dewatering pumps and accessories.

(d) Transformer House containing high tension switchgear, transformers, low tension switchgear, overhead crane and other accessories.

(e) Electric Cables supplying power and lighting circuits.

(f) Office building containing Assistant Superintendent's Office, laboratory and equipment, clerks' rooms, store, and laboratories and furniture.

(g) Assistant Superintendent's Bungalow with four rooms.

(h) Five Drivers' Quarters, each with two rooms.

(i) Fifteen single room quarters.

(j) Necessary water supply, sanitary and electrical services for items *(f)* to *(i)*.

(k) Roads and pathways inside Disposal Works Compound, boundary fence and gates, trees and lawns.

(l) Electric lighting for whole installation.

(m) Sludge drying beds and Return Sludge pumping plant with necessary flow and return piping to main plant.

(n) Three Venturi flumes with electrical recording gear.

(5) *Disposal Works to River*—

Effluent channel with pitched bed and sides including aqueduct crossing over the Agra Canal.

(6) *New Delhi Power House to Disposal Works*—

6600 Volt transmission line to the Disposal Works with branch to New Pumping Station including railway and road crossings.

3. *General*—

(1) Any other work constructed as part of the Delhi Sewage disposal scheme that the Central Government may hand over to the Board.

(2) All land acquired for or occupied by the works mentioned in Part AA and in Division II of Part B of this Schedule, including the sites of the Kilokri and Muttra Road Plants."

Amendment of Schedule 2, Act 23 of 1926.

18. In Schedule 2 to the said Act—

(a) in entry *(d)*, for the words "Imperial Delhi Municipal Committee" the words "New Delhi Municipal Committee" shall be substituted ; and

(b) in entry *(e)*, for the words and brackets "Delhi (New) Cantonments" the words "Delhi Cantonment" shall be substituted.

ACT NO. XIX OF 1938.

The Child Marriage Restraint (Second Amendment) Act, 1938.

(Recd. G. G.'s assent on 9th April 1938.)

An Act further to amend the Child Marriage Restraint Act, 1929.

WHEREAS it is expedient further to amend the Child Marriage Restraint Act, 19 of 1929 ; It is hereby enacted as follows—

Short title.

1. This Act may be called the Child Marriage Restraint (Second Amendment) Act, 1938.

Amendment of Section 2, Act 19 of 1929.

2. In Clause (c) of Section 2 of the Child Marriage Restraint Act, 19 of 1929 (hereinafter referred to as the said Act), between the words "is" and "thereby" the words "or is about to be" shall be inserted.

3. In Section 8 of the said Act for the words "District Magistrate" the words "Magistrate of the first class" shall be substituted.

Amendment of Section 8, Act 19 of 1929.

4. For Section 9 of the said Act the following shall be substituted, namely—

Substitution of new section for Section 9, Act 19 of 1929.

"9. No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed."

5. For sub-section *(1)* of Section 11 of the said Act the following shall be substituted, namely—

Amendment of Section 11, Act 19 of 1929.

"*(1)* When the Court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under Section 250 of the Code of Criminal Procedure, 5 of 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed."

6. The following section shall be added as Section 12 of the said Act, namely—

Insertion of new Section 12 in Act 19 of 1929.

"12. *(1)* Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in Sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

Power to issue injunction prohibiting marriage in contravention of this Act.

(2) No injunction under sub-section *(1)* shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section *(1)*.

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader ; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment."

Notes.—It is but proper that an opportunity should be given to the person against whom injunction is contemplated to be heard against the proposed order. The proviso has been added on the recommendation of the Select Committee.

ACT NO. XX OF 1938.

The Criminal Law Amendment Act, 1938.

[Recd. G. G.'s assent on 14th September 1938.]

An Act to amend the criminal law.

WHEREAS it is expedient to supplement the criminal law by providing for the punishment of certain acts prejudicial to the recruitment of persons to serve in, and to the discipline of His Majesty's Forces: It is hereby enacted as follows :—

Short title, extent and commencement.

1. *(1)* This Act may be called the Criminal Law Amendment Act 1938.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province on such date as the Provincial Government may, by notification in the official Gazette, appoint in this behalf for such province.

2. Whoever—

Dissuasion from enlistment and instigation to mutiny or insubordination after enlistment.

(a) with intent to affect adversely the recruitment of persons to serve in the Military, Naval or Air Forces of His Majesty, wilfully dissuades or attempts to dissuade the public or any person from entering any such Forces, or

(b) without dissuading or attempting to dissuade any person from entering such Forces, instigates the public or any person to do, after entering any such Force, anything which is an offence punishable as mutiny or insubordination under S. 27, Army Act 8 of 1911, or Ss. 10 to 12 and 14 to 17 inclusive of the Naval Discipline Act as applied to the Indian Navy by the Indian Navy (Discipline) Act 34 of 1934, or Ss. 35 to 37 inclusive of the Indian Air Force Act 14 of 1932, as the case may be, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

No person shall be prosecuted for any offence under this Act except with the previous sanction of the Provincial Government.

Exception 1.—The provisions of Cl. (a) of this Section do not extend to comments on or criticizm of the policy of Government in connexion with the Military, Naval or Air Forces, made in good faith without any intention of dissuading from enlistment.

Exception 2.—The provisions of Cl. (a) of this Section do not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given, or for the benefit of any member of his family or of any of his dependants.

ACT NO. XXI OF 1938.

The Indian Emigration (Amendment) Act, 1938.

[Recd. G. G.'s assent on 22nd September 1938.]

An Act further to amend the Indian Emigration Act, 1922.

WHEREAS it is expedient further to amend the Indian Emigration Act 7 of 1922, for the purpose hereinafter appearing: It is hereby enacted as follows :

Short title.

1. This Act may be called the Indian Emigration (Amendment) Act, 1938.

Amendment of S. 24, Act 7 of 1922.

2. In sub-section *(2)* of section 24 of the Indian Emigration Act, 7 of 1922 (hereinafter referred to as the said Act),—

(a) the word "and" at the end of clause *(j)* shall be omitted;

(b) after clause *(j)* the following clause shall be inserted, namely :—

"*(k)* the issue of the permits referred to in sub-section *(1)* of section 30-A ; and" ;

(c) the existing clause *(k)* shall be re-lettered clause *(l)*.

Insertion of new S. 30-A in Act 7 of 1922.

3. After S. 30 of the said Act the following section shall be inserted, namely :—

Power to prohibit departure by sea from British India for the purpose of unskilled work.

"30-A. *(1)* The Central Government may, by notification in the official Gazette from a date and for reasons to be specified in the notification, prohibit all persons or any specified class of persons from departing by sea out of British India to any specified country beyond the limits of India for the purpose of unskilled work unless possessed of a prescribed permit or otherwise exempted by general or special order of the Central Government from the provisions of the notification.

(2) Every notification issued under this section shall be laid before both Chambers of the Central Legislature as soon as may be after it is made.

(3) Whoever departs or attempts to depart out of British India in contravention of a notification issued under sub-section *(1)* shall be punishable with the punishment provided for an offence under sub-section *(1)* of section 25.

(4) Whoever causes or assists or attempts to cause or assist any person to depart out of British India in contravention of a notification issued under sub-section *(1)* shall be punishable with the punishment provided for an offence under sub-section *(1)* of section 25".

Notes. — The statement of objects and reasons states as follows: "It has been found that the lack of power to regulate the total flow of emigration for unskilled work, whether assisted or voluntary and whether under contract or not may operate to the detriment of Indian communities overseas, particularly in times of economic depression." This Act is intended to remedy the above defect.

ACT No. XXII OF 1938.

The Indian Aircraft (Amendment) Act, 1938.

[Recd. G. G.'s assent on 24th September 1938.]

An Act further to amend the Indian Aircraft Act, 1934.

WHEREAS it is expedient further to amend the Indian Aircraft Act, 22 of 1934, for the purpose hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Aircraft (Amendment) Act, 1938.

Insertion of new S. 8B in Act 22 of 1934.

2. After section 8A of the Indian Aircraft Act, 22 of 1934 (hereinafter referred to as the said Act), the following section shall be inserted, namely :—

Emergency powers for protecting the public health.

"8B. *(1)* If the Central Government is satisfied that India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.

(2) In any such case the Central Government may, without prejudice to the powers conferred by S. 8A, by notification in the official Gazette, make such temporary rules with respect to aircraft and persons travelling or things carried therein and aerodromes as it deems necessary in the circumstances.

(3) Notwithstanding anything contained in section 14, the power to make rules under sub-section *(2)* shall not be subject to the condition of the rules being made

after previous publication, but such rules shall not remain in force for more than three months from the date of notification:

Provided that the Central Government may by special order continue them in force for a further period or periods of not more than three months in all."

Notes. — The Governor-General in Council had till the passing of the Government of India Act, 1935, power to prescribe temporary emergency regulations under S. 2 of the Epidemic Diseases Act (3 of 1897). After 1st April 1935, this power was removed and located in the Provincial Government, for the Province. This Act gives the Central Government the power of emergent regulation to protect India against the introduction of dangerous disease. Under this Act, the power to make rules or regulations is not subject to the condition of previous publication for three months which is required under S. 14 of the Indian Aircraft Act, but the rules so framed shall not remain in force for more than three months from the date of notification.

Amendment of S. 10, Act 22 of 1934.

3. In section 10 of the said Act, for the words, figure and letter "or section 8A" the words, figures and letters "section 8A or section 8B" shall be substituted.

ACT NO. XXIII OF 1938.

The Indian Tea Cess (Amendment) Act, 1938.

[Recd. G. G.'s assent on 24th September 1938.]

An Act further to amend the Indian Tea Cess Act, 1903, for a certain purpose.

WHEREAS it is expedient further to amend the Indian Tea Cess Act, 9 of 1903, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. *(1)* This Act may be called the Indian Tea Cess (Amendment) Act, 1938.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Amendment of S. 4, Act 9 of 1903.

2. In sub-section *(2)* of section 4 of the Indian Tea Cess Act, 9 of 1903,—

(a) for the word "twenty-seven" the word "twenty-eight" shall be substituted;

(b) in clause *(c)*, the word "and", where it occurs at the end of the clause, shall be omitted; and

(c) after clause *(d)* the following clause shall be added, namely:—

"*(e)* one on the recommendation of the Travancore Government to represent the tea planters of Travancore."

Notes.—This Act provides for separate representation of tea planters of Travancore on the Indian Tea Market Expansion Board; and this is but proper as the Government of Travancore levy cess on tea exported from that State at the same rate as that levied in British India and credit the cess proceeds to the Board.

ACT NO. XXIV OF 1938

The Employers' Liability Act, 1938.

[Recd. G. G.'s assent on 24th September 1938.]

An Act to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen.

WHEREAS it is expedient to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen; It is hereby enacted as follows:

Short title and extent.

1. *(1)* This Act may be called the Employers' Liability Act, 1938.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,

(a) "workman" means any person who has entered into, or works under a contract of, service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, oral or in writing ; and

(b) "employer" includes any body of persons whether incorporated or not, and any managing agent of an employer, and the legal representatives of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Notes. — The definition of 'workman' is more comprehensive than that given in the Workmen's Compensation Act, but the definition of the word "employer" is the same in both the Acts.

Defence of common employment barred in certain cases.

3. Where personal injury is caused to a workman,

(a) by reason of the omission of the employer to maintain in good and safe condition any way, works, machinery or plant connected with or used in his trade or business, or by reason of any like omission on the part of any person in the service of the employer who has been entrusted by the employer with the duty of seeing that such way, works, machinery or plant are in good and safe condition ; or

(b) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence ; or

(c) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed ; or

(d) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved by any authority and which has been so approved) or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties ;

a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

Notes. — In Civil suits for damages for injuries sustained by workmen, the employers used to have recourse successfully to the plea of the doctrine of common employment by which the employer is not normally liable to pay damages to a workman for an injury resulting from the default of another workman. This Section seeks to abolish such a plea.

Risk not to be deemed to have been assumed without full knowledge.

4. In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

Notes. — This Section abolishes another plea which the employer used to take, viz. the doctrine of assumed risk by which an employee is presumed to have accepted a risk, if it is such that he ought to have known it to be part of the risks of his occupation. Under this Section, no such presumption can be raised and it is for the employer to prove that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

Saving.

5. Nothing in this Act shall affect the validity of any decree or order of a Civil Court passed before the commencement of this Act in any such suit for damages.

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FEDERAL COURT OF INDIA
1938

Chief Justice :

The Hon'ble Sir Maurice Linford Gwyer, K.C.B., K.C.S.I.

Puisne Judges :

The Hon'ble Sir Shah Mohammad Sulaiman, Kt., M.A., LL.D., Bar-at-law.

„ Mr. M. R. Jayakar, Bar-at-law.

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